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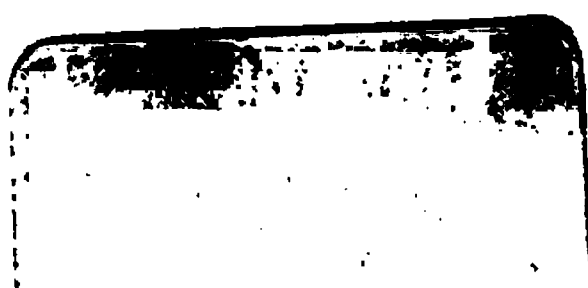
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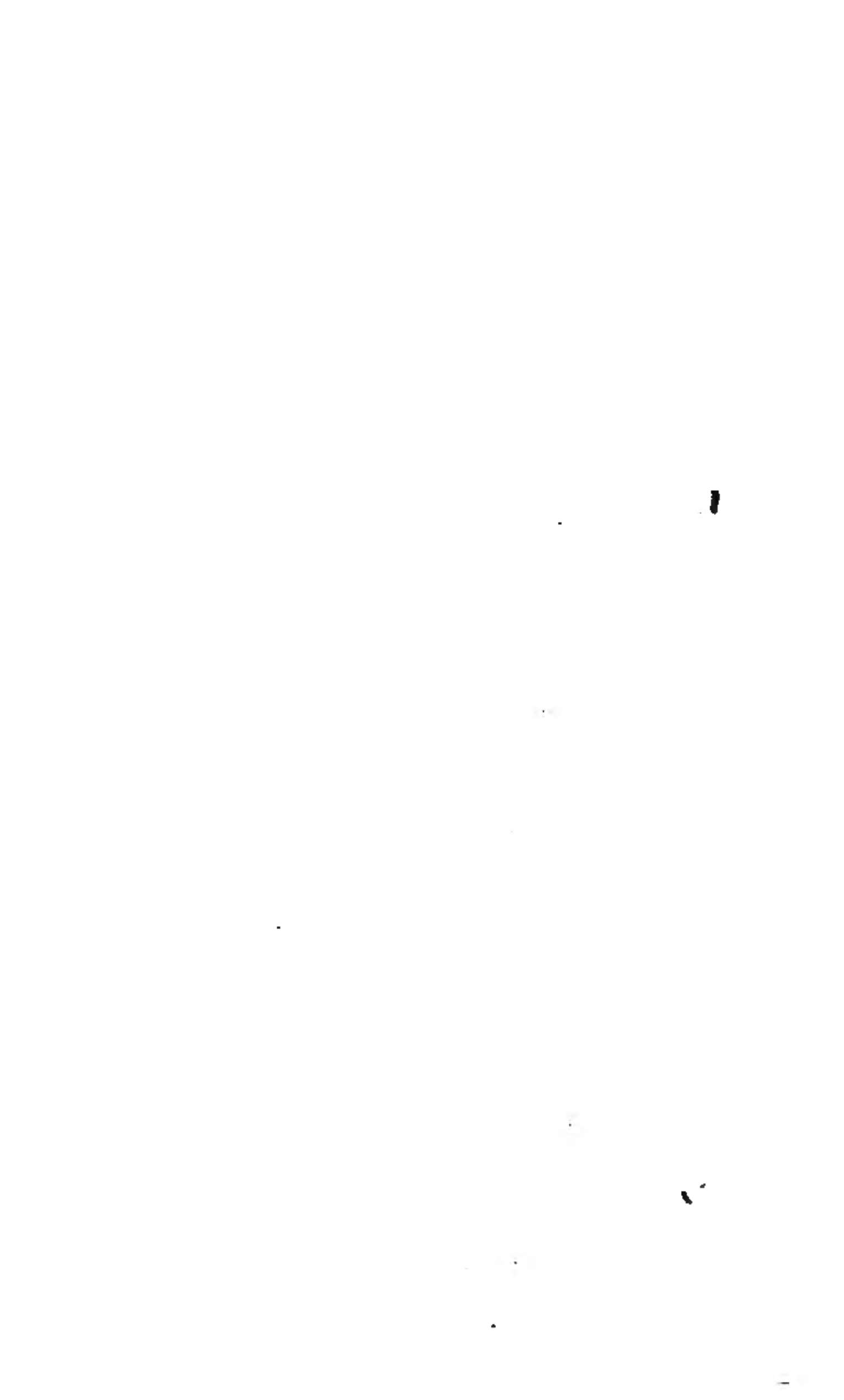
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THE
AMERICAN STATE REPORTS,

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY.

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE
COURTS OF LAST RESORT
OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. IX.

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AMERICAN STATE REPORTS.

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AMERICAN STATE REPORTS.
VOL. IX.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

MOORE v. EURE.

[101 NORTH CAROLINA, 11.]

EXECUTORS AND ADMINISTRATORS — DEVASTAVIT. — An administrator, whether domestic or foreign, who finds when he qualifies as such a sum of money to the credit of the estate, deposited in a solvent bank in the state of his residence, and who adds to such sum as payments are made him, but who also pays out the money so deposited as soon as those entitled to it will receive it, is not guilty of a *devastavit*, in case the bank fails.

EXECUTORS AND ADMINISTRATORS ARE ONLY REQUIRED TO EXERCISE ORDINARY CARE AND REASONABLE DILIGENCE in managing the estate they represent.

Pruden and Vann, for the plaintiffs.

L. L. Smith, for the defendant.

DAVIS, J. Civil action tried before Montgomery, J., at spring term, 1888, of the superior court of Gates County. At spring term, 1887, an order was made, directing W. T. Cross, clerk of the court, to state the account of the defendant, administrator, etc., of James Sears, deceased, with the estate of said deceased, and in obedience to that order the decree stated the account, and made the report filed as part of the transcript. So far as material for our consideration, the following facts are agreed upon, and are the facts upon which the referee based his account:—

1. James Sears died in 1870, domiciled in Gates County, leaving a will, in which his widow, Mary A., was named and qualified as executrix.

2. Mary A. died in 1884, domiciled in Gates County, North

Carolina, and letters of administration *de bonis non cum testamento annexo* were only issued to the defendant on January 24, 1884, by the proper court of that county.

3. At the time of her death the said Mary A. had on deposit, in her name as executrix, in the Exchange National Bank of Norfolk, Virginia, the sum \$1,560.38, belonging to the estate of her testator, and also had in the bank of Burruss, Son, & Co., of Norfolk, Virginia, the sum of \$771.47, belonging to said estate.

4. Shortly after the death of Mary A., and the qualification of the defendant Eure, he had the fund in the Exchange National Bank transferred to his own name in that bank as administrator of James Sears, and on the same day drew the fund from the bank of Burruss, Son, & Co., and deposited the same, with other funds of the estate, in the Exchange National Bank, with the fund already there in his name as administrator as aforesaid, and this account and the funds of the estate were kept separate from any other money of the said Eure. and at the time of the failure of said Exchange National Bank, on the 2d day of April, 1885, he had in the bank, to his credit on this account, the sum of \$2,439.50.

5. That at the time the said Eure opened his administrator's account at said bank, and continuously thereafter to its failure, it was regarded as one of the safest, best managed, and most solvent institutions of the kind south of the Potomac. No one doubted its solvency, and it was used as the place of deposit by the leading and most cautious business men and capitalists in Virginia and eastern North Carolina, and the defendant so regarded it; and had then, and had had for several years, his individual bank account at said bank, and sustained considerable private loss by its failure, he being a resident of Norfolk, Virginia. The firm of Eure, Farrar, & Co., of which the defendant was a member, also kept an account at said bank, and at times had considerable money on deposit there.

6. Prior to the qualification of the said Eure as administrator of said estate, Uriah Vaughan, of Murfreesborough, had been appointed receiver of the estate of the plaintiffs; and in less than thirty days after the said Eure qualified and had the funds in the Exchange Bank transferred to his name as administrator, and made the deposit of the funds from Burruss, Son, & Co. at said bank, he wrote to Vaughan and informed him that he had the funds on hand in bank, and desired to

pay them to him as receiver. The said Eure did not receive any answer to his letter, but shortly thereafter saw Vaughan in Norfolk, and stated to him that he had the money in bank, and desired him to receive it for the plaintiffs, and Vaughan replied that he did not want to be troubled with it, and that he, Eure, could take care of it as well as he could.

7. At the time of the qualification of Eure as administrator, all of the plaintiffs, except Victoria, were minors, and prior to the failure of the bank Eure had paid off the indebtedness of the estate known to him, and paid to Victoria the amount charged in the account against her, which was approximately her part of the funds collected up to that time.

8. Shortly before the failure of the bank, plaintiff Henrietta became of age, to wit, January, 1885, but was married February, 1883, and still is under coverture, and Eure paid to her the sum of three hundred dollars, in part of her share, and offered to pay her another one hundred dollars, but she stated that she did not need it at that time. All the other plaintiffs were minors at the time of the failure of the bank.

9. The money in said bank, at the failure, belonged to the plaintiffs in this action under the will of the said Sears.

The plaintiffs excepted to the report and account filed by the referee, for that "he charges the defendant with the amount received in dividends from the receiver of the Exchange National Bank only, when he ought to have charged him with the full amount, \$2,477.03, on hand at the date of the failure of said bank, April 2, 1885, with interest on the same to that date."

The exception was overruled by the court, and judgment rendered in accordance with the report, from which the plaintiffs appealed.

The single question presented for our consideration is as to the liability of the defendant administrator for the loss sustained by the failure of the Exchange National Bank.

The case shows, and it is conceded, that the defendant acted in perfect good faith, but the counsel for the plaintiffs insist: —

1. That it was the duty of the defendant when the receiver Vaughan declined to receive the money to "take proper steps to make him do so, or pay the amount into the clerk's office, in discharge of his obligation, in accordance with the provision of the code, section 1543."

This is authorized by the statute, but it is not required, —

the statute is not mandatory; it only declares that "it shall be competent for any executor, administrator, or collector, etc., . . . to pay into the office of the clerk of the superior court," etc. It is not made his duty to do so, and there may sometimes be reasons for not doing so.

2. It is further insisted for the plaintiffs that the defendant committed a *devastavit* in carrying the money out of the state and beyond the jurisdiction of our courts; and to sustain this position, *Collins v. Gooch*, 97 N. C. 186; *Lucas v. Wasson*, 3 Dev. 398; 24 Am. Dec. 266; *Pitt v. Petway*, 12 Ired. 69; *Grim v. Wicker*, 80 N. C. 343; *Strauss v. Crawford*, 89 Id. 149; *Havens v. Lathene*, 75 Id. 506,— are cited and relied on.

The case of *Collins v. Gooch*, *supra*, is unlike this. In that case the receiver was acting for minors under the appointment of the court, with duties clearly and well defined in the order appointing him. While no intentional dereliction of duty was imputed to him, for it appeared that he acted in perfect good faith, yet the order under which he was acting made it his duty to make annual returns to the court to be passed upon and audited in the cause thus pending by the presiding judge. This he failed to do. He was, as was said by the court, a *quasi* guardian; and it was further said that if he had reported the deposit, as it was made his duty to do, and been sustained by the court, he would have been protected. The other cases cited by the counsel for the plaintiff (except the last) are cases in which it is held that one tenant in common of personal property cannot carry the common property beyond the limits of the state without the consent of his cotenant; and if he does so, it is a conversion for which an action will lie. Tenants in common have an equal right to the possession of the common property, and we fail to see the analogy between the cases cited and that before us.

The administrator is appointed by the court, and is required to take an oath and give the bond required by law, and a non-resident who does this is not included in the disqualifications of the code, section 1377. Administrators, whether resident or non-resident, are required to give bond, and so are executors who reside out of the state: Code, sec. 1515; and these bonds are for the protection of those interested in the estate committed to their charge against loss resulting from bad faith or negligence. Good faith and the use of ordinary care and reasonable diligence are all that can be required of executors and administrators, whether resident or non-resident.

They are not insurers: *Deberry v. Ivey*, 2 Jones Eq. 370; *Nelson v. Hall*, 5 Id. 32.

Even guardians whose duties in regard to investments are prescribed, while held to the highest degree of good faith, are not bound as insurers: *Covington v. Leak and Wall*, 67 N. C. 363; *Atkinson v. Whitehead*, 66 Id. 296.

The "hard rule upon public officers," enunciated in *Havens v. Lathene*, *supra*, has never been held to apply to executors and administrators. There is no error.

Affirmed.

ADMINISTRATOR IS NOT LIABLE for estate funds deposited by him in a bank, generally reputed and supposed by him to be solvent, by the subsequent failure of such bank: *Norwood v. Harness*, 93 Ind. 134; 49 Am. Rep. 739; note to *Seawell v. Greenway*, 75 Am. Dec. 803.

DEGREE OF CARE REQUIRED of executors and administrators in the administration of the affairs of the estate they represent is in measure the same as that required of bailees for hire, or the degree of care and skill which prudent men exercise in the direction of their affairs. This rule has been applied by an unbroken line of authorities to the executor's or administrator's management of the affairs of the estate in all its details: *State v. Meagher*, 44 Mo. 356; 100 Am. Dec. 298, note 304; *Rubottom v. Morrow*, 24 Ind. 202; 87 Am. Dec. 324, note 326, 327; *Whitney v. Peddicord*, 63 Ill. 249; *Cooper v. Williams*, 109 Ind. 270; *McNichol v. Eaton*, 77 Me. 246; Schouler on Executors and Administrators, sec. 313.

REA v. HAMPTON AND NICHOLS.

[101 NORTH CAROLINA, 51.]

CONSTITUTIONAL LAW—RIGHT OF FISHERY. — State has the right to regulate the exercise of the common right of fishery in its navigable waters, and to impose such limitations and restrictions on the exercise of such right as it may deem wise and just, including the right to authorize the removal of obstructions or nuisances caused by fishermen in such navigable streams.

CONSTITUTIONAL LAW—RIGHT OF FISHERY. — Chapter 115 of North Carolina acts of 1875 (Code, sec. 3383), making it unlawful for any person to set or fish a "Dutch" or "Pod" net in certain waters of the state, and authorizing an officer to remove such net when set or fished, is constitutional.

Pruden and Vann, for the plaintiffs.

George V. Strong and J. E. Moore, for the defendants.

DAVIS, J. This was an appeal from a judgment of Graves, J., rendered at February term, 1888, of Bertie superior court, granting a perpetual injunction restraining the defendant

from removing the stakes of the plaintiff under section 3383 of the code.

The plaintiffs, in substance, alleged that they were the owners of certain traps, and lawfully and rightfully engaged in fishing in the waters of Albemarle Sound, near the Bertie shore, and were operating certain traps for taking fish, called Long Island fish traps, and that the defendant threatened to tear down and destroy said traps, and unless restrained, great and irreparable damage will be sustained by the plaintiffs, and they ask for an injunction.

The answer of the defendants admits that the plaintiffs were the owners of certain traps, but deny that they were Long Island traps, or that the plaintiffs were rightfully and lawfully fishing in Albemarle Sound, and say that they were using Dutch or Pod nets, and fishing with traps, and within the distance from the mouth of Roanoke River prohibited by section 3383 of the code.

The following is the case settled on appeal: —

The defendants had applied to the sheriff of Bertie County to remove the nets, etc., of the plaintiffs, in accordance with section 3383 of the code, alleging the nets of plaintiffs to be Dutch nets or Pod nets, and that they were fished within two miles of the mouth of Roanoke River, and they were proceeding to remove the same.

Thereupon the plaintiffs brought this action to restrain the defendants; and the same coming on to be heard, and it appearing that there were two questions of fact arising in the case, his honor impaneled a jury to ascertain the same for his information, and submitted to them the following issues: —

Were the nets fished by plaintiffs Dutch or Pod nets?

Were the nets fished within two miles of the mouth of Roanoke River?

To both of said issues the jury responded, Yes.

Thereupon the plaintiffs moved for judgment for a perpetual injunction, notwithstanding the findings of the jury, and the defendants moved for a judgment dissolving the injunction.

His honor rendered judgment as requested by the plaintiffs, making the injunction perpetual, and the defendants appealed.

By section 3383 of the code, it is made "unlawful for any person to set or fish a Dutch net or Pod net in Roanoke River,

Cashie or Middle River, or within two miles of the mouth of said rivers, or within one mile of the mouth of any other river emptying into Albemarle Sound, and all persons who shall set or fish any such net in said sound shall pull up and remove the stakes used for the same by the first day of June next succeeding the fishing season, and if any person shall set or fish any Dutch net or Pod net in said sound, in violation of this section, he shall be guilty of a misdemeanor, and be subject to a penalty of three hundred dollars, to be recovered by any person in the superior court of the county in which the offense shall be committed. And the sheriff of such county shall, when requested, remove any portion of such nets set or fished in violation of this section, at the cost of the violators," etc.

The facts found show that the plaintiffs were fishing in Albemarle Sound with Dutch or Pod nets, and within two miles of the mouth of Roanoke River, in violation of section 3383 of the code, under which the defendants claimed the authority to have plaintiffs' nets removed, but counsel for plaintiffs insist that the last clause of section 3383 is in violation of section 17 of article 1 of the constitution, and if so, they had a right to enjoin the defendants. This presents the question, Were the defendants threatening or about to deprive the plaintiffs of any liberty, privilege, or property contrary to the law of the land?

Albemarle Sound being navigable, the plaintiffs had no right to a several fishery in its waters, and the state had the undoubted right to regulate the exercise of the common rights of fishing therein, and to impose such limitations and restrictions on the exercise of the rights as it might deem wise and just.

The constitution of the state, unlike that of the United States, contains limitations on, and not grants of, legislative power. Albemarle Sound, being navigable, is not subject to entry, and every citizen of the state has the liberty and privilege of fishing therein, subject to such regulations of the right as the legislature may establish: *McCready v. Virginia*, 94 U. S. 391; *Skinner v. Hettrick*, 73 N. C. 53; *Hettrick v. Page*, 82 Id. 65, and cases cited. Unless the plaintiffs have some right, privilege, or property in these waters, or some right to obstruct others in the use of them for fishing purposes, under rules and regulations and by methods allowed by law, we fail to see what right they have to complain, unless that right be

to invoke the constitution as a protection to them in violating the law.

The relief sought in *Hettrick v. Page*, *supra*, was not unlike that sought by the plaintiff in this action. It was, like this, an application for an injunction to prevent the removal of stakes or any obstruction of the plaintiffs in their use, which the defendants were threatening to do, under chapter 115 of the acts of 1875: Code, sec. 3383. In that case, the stakes were put up for operating Pod nets in violation of the act, and they were required to be removed by the day named. The chief justice said: "The presence of them [the stakes] in the sound after that date is a public nuisance, and this court is asked to assist him [the plaintiff] in maintaining it in violation of his duty under the law, and to prevent its being obeyed. The proposition is a novel one, and no court will listen to such an application."

While it is true, as insisted by the plaintiff, that an action will not lie against a person unlawfully obstructing a highway at the instance of one who has sustained no special damage, and redress must be sought for the public wrong on behalf of the public, it by no means follows that a person obstructed, or indeed, any one else, may not himself remove the impediment to his passing without incurring personal liability to the owner of the property removed.

The question of the constitutionality of the act was not raised in *Hettrick v. Page*, *supra*, as in this, and we are referred by counsel to *Hoke v. Henderson*, 4 Dev. 1, 25 Am. Dec. 677, and to *Vann v. Pipkin*, 77 N. C. 408. We fail to see the analogy between those cases and this. They only decide that a person holding an office has a property in his office, of which he cannot be deprived while the office remains without violating the constitution,—it is property of which he cannot be deprived "but by the law of the land."

The counsel also cites Cooley on Constitutional Limitations, 362 et seq.; *Ames v. Port Huron Co.*, 11 Mich. 139; 83 Am. Dec. 731; *Rockwell v. Moring*, 35 N. Y. 302; and *Wynehamer v. People*, 13 Id. 378. It is said in Cooley on Constitutional Limitations: "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. . . . Nor can a party, by his misconduct, so forfeit a right that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form. Forfeitures of rights

and property cannot be adjudged by legislative acts, and confiscation without a judicial hearing after due notice would be void, as not having due process of law. . . . And if the legislature cannot confiscate property or rights, neither can it authorize individuals to assume, at their option, powers of police which they may exercise in the condemnation and sale of property against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners. And a statute which authorizes a party to seize the property of another without process or warrant, and sell it without notification to the owner for the punishment of a private trespass, and to enforce a penalty against the owner, can find no justification in the constitution."

As the legislature had the undoubted right to regulate the manner in which the right of fishing in Albemarle Sound should be exercised, the plaintiffs had no right to fish in its waters in any mode not allowed by law. The facts found show that they were fishing in violation of law, and it would be singular if they could ask the law to protect them in its violation.

They had put their stakes and used their nets where it was unlawful to put and use them. The stakes and nets were unlawfully there by the act of the plaintiffs, and not against their "consent," as were the trespassing animals in *Rockwell v. Moring*, cited by Judge Cooley, and if they did not remove them and thus abate the nuisance themselves, they could be removed and the nuisance abated in the mode prescribed in the act regulating fishing in the sound. Judge Cooley, in discussing the police power of the state, says "that each state has complete authority to provide for the abatement of nuisances, whether they exist by the fault of individuals or not." He also says: "The state has the authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their right without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property": Constitutional Limitations, 596.

Upon a careful examination of the authorities cited by the learned counsel for the plaintiff, we do not think that they warrant the conclusion that the act in question is unconstitutional. The plaintiffs had no such "vested rights" as were

contemplated in the citation of counsel from Cooley's Constitutional Limitations.

The case of *Ames v. Port Huron Log Driving and Booming Co.*, 11 Mich. 139, 83 Am. Dec. 731, in which an act of incorporation which gave to the defendant company extensive powers over the logs and lumber of others on the Black River, a navigable stream, was held to be unconstitutional, would seem to support the plaintiff's position, but it will be found upon examination that it violated the constitution of Michigan, which declares that "no navigable stream in this state shall be either bridged or dammed without authority of the board of supervisors of the proper county, under the provision of law. No such law shall prejudice the right of individuals to the free navigation of such streams." The act of incorporation was in violation of that provision.

In *Rockwell v. Moring*, *supra*, so much of an act of the legislature of New York relating to animals running at large as authorized the seizure and sale of animals trespassing within private inclosure without notice to the owner, and without any judicial process, and as a mere penalty for a private trespass, was declared unconstitutional. That case has no analogy to the case before us; neither has the case of *Wynehamer v. People*, *supra*, which was discussed at great length, and in which the court was singularly divided, and in which it was declared that an "act for the prevention of intemperance, pauperism, and crime," which made no discrimination between liquor owned when the act took effect and that which might afterwards be manufactured or imported, was unconstitutional.

It is said that the "cost" of removing the stakes and nets is left arbitrary; the answer is, that depends upon the labor and expense attending the removal, and must of necessity be uncertain, but the cost must be reasonable, and if excessive charges are made, the owner is not obliged to pay more than what may be adjudged to be just and reasonable. Doubtless the stakes and nets are valuable, and it would be the duty of the sheriff to remove them with as little injury and cost as practicable. If owners of nets and stakes wish to avoid any question as to the *quantum* of costs, etc., which they are not precluded by any law from doing, they can do so by removing them themselves.

There is error in the judgment of the court below.

Reversed.

LEGISLATURE OF STATE MAY REGULATE the common right of fishery in the navigable waters thereof, and an act passed to protect such right is valid: *Moulton v. Libbey*, 37 Me. 472; 59 Am. Dec. 57; *Phipps v. State*, 22 Md. 380; 85 Am. Dec. 654, note 658; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; 100 Am. Dec. 597.

FULLER v. FOX.

[101 NORTH CAROLINA, 119.]

EVIDENCE OF HANDWRITING, founded on a comparison with other writings admitted or proved to be genuine, is inadmissible, nor should the jury be allowed to make such comparison.

T. M. Pittman and L. C. Edwards, for the plaintiff.

A. C. Zollicoffer, for the defendant.

DAVIS, J. Civil action, tried before Avery, J., at September term, 1888, of the superior court of Vance County.

The plaintiff alleges that, in 1883, he made a loan of \$450 to W. Fox, who executed his note therefor, as follows:—

“On or before 22 day of February, 1887, I promise to pay to I. I. Fuller four hundred and fifty dollars, with eight per cent interest, for value received. Feb. 19, 1883.

(Signed)

“W. Fox.

“T. W. FINCH.”

That Fox died in 1887, leaving a last will and testament, which was duly proved, and the defendant, the executrix therein named, qualified as such. He demands judgment for the amount alleged to be due, with interest.

The defendant admits the death of Fox; that he left a will, in which she is named executrix, and that she qualified as such; but says, as to the other material allegations of the complaint, she has no knowledge or information thereof sufficient to form a belief, and she denies them.

The following issue was submitted to the jury: “Did the defendant’s intestate [testator] execute the note sued on?” To this issue they responded, Yes.

There was evidence tending to prove the execution of the note by proving the handwriting of the subscribing witness Finch, and of Fox, and there was evidence tending to prove the contrary. It was in evidence, on behalf of the defendant, that certain papers marked 1, 2, 3, and 4, with the signatures of W. Fox thereto, were genuine, and were signed by him,

and that the signatures to these papers were not in the same handwriting as that to the note sued on.

The defendant offered to exhibit to the jury the papers marked 1, 2, 3, and 4, for their inspection.

On objection, the court refused to allow it, and the defendant excepted. The papers marked 1, 2, 3, and 4 were then read to the jury.

The only exception in the record presented for our consideration is the single question, Was there error in refusing to permit the jury, for the purpose of comparison, to inspect the papers which had been testified to as genuine?

The counsel for the defendant concedes that it has been held to be the rule in this state that it was not competent, in passing upon questions of this character, to submit writings, such as were offered to the inspection of the jury, for the purpose of comparison by them, but he insists, with earnestness and ability, that the rule is not in harmony with more recent decisions in many of the states of the Union, and with the case of *Yates v. Yates*, 76 N. C. 142; and that the court should not withhold from the jury the inspection of writing admitted or proved to be genuine, but should permit such writings to be submitted to the jury for the purpose of comparison, and thus to aid them in coming to a correct verdict.

The law, as it exists in the different states, is not uniform. In many of them it has been regulated by statute, and in some of them it has been made to conform to the rule insisted on by counsel for the defendant: Rogers on Expert Testimony, 190. But in most of the states, and with rare exception, where there is no statutory regulation upon the subject, the law is held to be as laid down by Gaston, J., in *Pope v. Askew*, 1 Ired. 16; 35 Am. Dec. 729; Rogers on Expert Testimony, 192; Lawson on Expert and Opinion Evidence, 400.

It will be found, upon examination, that in *Powell v. Fuller*, 59 Vt. 688, and in most of the cases relied on by counsel for the defendant, the papers permitted to go to the jury for inspection and comparison were such as were in evidence in the cause for other purposes, or such as were first passed upon by the court and adjudged to be genuine.

We think the cases of *Pope v. Askew*, 1 Ired. 16; 35 Am. Dec. 729; *Outlaw v. Hurdle*, 1 Jones, 150; *Otey v. Hoyt*, 3 Id. 407; *Watson v. Davis*, 7 Id. 178; *Burton v. Wilkes*, 66 N. C. 604; and *Tuttle v. Rainey*, 98 Id. 513, — settle the law in this state to

be that testimony as to handwriting, founded on what is properly called a comparison of hands, is inadmissible, and that "a jury cannot decide by a comparison of handwriting." Jurors are not generally experts in handwriting, and such evidence, for the many reasons given in the cases cited, would often tend to confuse and mislead them.

The case of *Yates v. Yates, supra*, is not in conflict with these authorities. In that case the witness, after examining the signature of John Elber to a deposition, admitted to be genuine, and his signature as a witness to the deed in controversy, was permitted to give it as his opinion that the latter signature was not genuine. The witness, as an expert, was allowed to compare the signature admitted to be genuine with the signature in dispute, but the paper was not submitted to the inspection of the jury, and the comparison was not made by them, and though there is a *dictum* of Rodman, J., and a reference to some authorities which seem to sustain the position of counsel for the defendant, the point decided is in perfect harmony with the authorities cited.

In fact, Judge Rodman, in admitting the testimony sustaining the ruling of the judge below, says: "This was permissible under the decision of *Outlaw v. Hurdle*."

There is no error.

Affirmed.

EVIDENCE OF HANDWRITING, founded on a comparison with other writings, is generally inadmissible: *Clark v. Wyatt*, 15 Ind. 271; 77 Am. Dec. 90, and note 92. But the question is a disputed one: *State v. Thompson*, 80 Me. 194; 6 Am. St. Rep. 172, and note 177.

EVIDENCE — HANDWRITING. — **THE OPINION OF EXPERTS AS TO GENUINENESS OF WRITING** in dispute, formed by a comparison with other writings proved to be genuine, is not admissible, unless the writing is so old that living witnesses cannot be had, and yet not old enough to prove itself: *Fes etc. v. Taylor*, 83 Ky. 259. One part of a correspondence being in evidence, the other part should be admitted: *Id.* See also *Hauseberger v. Cochran etc.*, 82 Va. 727.

LEATHERS v. GRAY.

[101 NORTH CAROLINA, 102.]

WILLS — CONSTRUCTION. — Where a testator employs words and phrases to express his intention in the disposition of his property by will, that have a well-known, legal, or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall in some appropriate way, to some extent, to be seen in the will, have qualified or used them in a different sense. And so also, if the use of such words brings his intention so expressed within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intent of the testator.

WILLS — CONSTRUCTION. — Testator cannot ignore, displace, and set at naught a rule of law applicable to and affecting the disposition of his property by his will, in whole or in part, and he must express his intention in words appropriate and sufficient to express his real meaning, and if he employs technical legal words, the technical meaning must prevail, unless the same shall be qualified or modified by superadded words in the will.

WILLS — RULE IN SHELLEY'S CASE. — Devise to a devisee "during her natural life, and after her death to the begotten heirs or heiresses of her body forever," vests in the devisee an absolute estate in fee-simple, according to the rule in Shelley's case. *Leathers v. Gray*, 96 N. C. 548, overruled.

John W. Graham, J. B. Batchelor, and John Devereux, Jr.,
for the petitioner.

John Manning and A. W. Graham, contra.

MERRIMON, J. This is an application to rehear the case of *Leathers v. Gray*, 96 N. C. 548. The will of Joseph Armstrong, deceased, a clause of which was interpreted in that case, was executed on the twenty-third day of May, 1839, and the testator having died in the mean time, it was proven in 1840.

The following is a copy of the clause in question of this will: "I also give and bequeath to my son, James W. Armstrong, the following property, to be received as soon as convenient, after the death or marriage of his mother, Peggy Armstrong, viz.: One half of three tracts of land, all lying on the waters of Flat River. The first is the tract my father lived and died on, containing 220 acres; the second is the tract that I bought from Henry Berry, containing 17 acres; and the third is a tract that I bought from my brother, William Armstrong, containing 216 acres"; and also "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body forever, one half of the three tracts of land, all lying on the

waters of Flat River," these tracts being the same above designated. This court in interpreting the last recited clause decided that Parthenia Leathers took but a life estate in the lands devised to her, and that her children took and were entitled to the remainder in fee therein.

The petitioner in this application, who is the defendant in the action, assigns error, and contends that the words of the clause, "and after her death to the begotten heirs or heiresses of her body forever," are words of limitation, and not words of purchase, and therefore Parthenia Leathers took the absolute fee-simple estate in one half of the lands so devised, and the same passed by her deed to the petitioner.

It is conceded that at the time the will before us became operative, it was a settled rule of law prevailing in this state, that whenever the ancestor of any gift or conveyance took an estate of freehold,—an estate for life,—and in the same gift or conveyance an estate is limited either mediately or immediately to "his heirs," or to the "heirs of his body," as a class, to take in succession as heirs to him, such words are words of limitation of the estate, and convey the inheritance,—the whole property,—to the ancestor, and they are not words of purchase. That is, in such case, the heir would take by descent and not by purchase, the ancestor would take the absolute property,—the whole estate,—with the right and power to dispose of it in any lawful way: *Shelley's Case*, 1 Coke, 104; 2 Bla. Com. 243; 2 Minor's Inst. 241, 242; 2 Washburn on Real Property, 553; *Davidson v. Davidson*, 1 Hawks, 163; *Sanders v. Hyatt*, 1 Id. 247; *Ham v. Ham*, 1 Dev. & B. Eq. 598; *Allen v. Pass*, 4 Dev. & B. 77; *Floyd v. Thompson*, 4 Id. 479; *Hollowell v. Kornegay*, 7 Ired. 261; *Weatherly v. Armfield*, 8 Id. 25; *Folk v. Whitley*, 8 Id. 133; *King v. Utley*, 85 N. C. 59; *Mills v. Thorne*, 95 Id. 362.

But it is seriously contended that this rule, commonly called the rule in Shelley's case, has no proper application to the clause of the will under consideration, because it sufficiently appears that the words thereof, "begotten heirs or heiresses of her body," were not used in a strict technical sense, but to imply simply the children, male or female, or both, of Parthenia Leathers, in which case her children would take as purchasers. We accepted this view as the correct one, giving effect to the intention of the testator, and made the decision, the correctness of which is now called in question. But after hearing the case reargued, and having given the

question raised much further consideration, we are of opinion that although the intention of the testator may have been, — no doubt was, — such as we declared it to be, he failed to express his purpose consistently with a settled rule of law, which it is our duty to uphold and enforce.

When a testator employs words and phrases to express his intention in the disposition of his property by will, that have a well-known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall in some appropriate way, to some extent to be seen in the will, have qualified or used them in a different sense. And so also, if the use of such words bring his intention so expressed within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intention of the testator.

Otherwise, technical words would have no certain meaning or effect, and the rule of law would be subverted in order to effectuate the real intention of the testator, unexpressed or imperfectly expressed. It is said, however, that the real intention of the testator must have effect, and so it must, but the real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it.

Moreover, a testator cannot ignore, displace, and set at naught a rule of law applicable to and affecting the disposition of his property by his will, in whole or in part,—the rule of law must prevail,—he must make his disposition of his property as allowed by and consistently with it; it determines the meaning and effect of his will, and its several parts, by the language employed in it, and not by what is intended, but not expressed, or not sufficiently expressed. He must express his intention in words appropriate and sufficient to express his real meaning, and if he employs technical legal words, the technical meaning must prevail, unless the same shall be qualified or modified by superadded words in the will.

The material part of the clause in question of the will before us is: "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body forever, one half of the three tracts of land," etc. Omitting, for the present, from this clause the word "heiresses," the words thereof "heirs . . . of her body" have a technical legal meaning, and it is clear,—nothing else appearing,—created an estate-tail in the

devisee named, which was converted by the statute (Acts of 1784, c. 204, sec. 5; Code, sec. 1325) into an estate in fee-simple. That statute provides that "every person seised of an estate-tail shall be deemed to be seised of the same in fee-simple," etc., and applies to the will under consideration: *Hollowell v. Kornegay, supra*; *Weatherly v. Armfield, supra*; *Folk v. Whitley, supra*.

If there were words in the context clearly showing that the testator did not use the words "heirs . . . of her body" in their technical sense, but to imply children of the devisee, then in that case these words would be treated as words of purchase, and the devisee would have taken but a life estate, and her children would have taken the remainder. But upon further reflection and scrutiny, we think there are no words of the context that can fairly, in view of numerous decisions of this and other courts, be construed as having such qualifying effect. Superadded words to have such effect must have appropriate pertinency in meaning and bearing; the purpose to qualify and change the technical meaning of language used must appear with reasonable certainty. It seems to us that the words "or heiresses," used in the clause referred to, cannot have such or any qualifying effect. In their direct connection, the next preceding word, "heirs," imply and embrace "heiresses," and all they mean or can mean, in their connection; they are mere expletives, and serve no useful purpose. The phrase "her heirs or heiresses" means no more than that the testator devised the land to his daughter and the heirs of her body, male and female, and the course of descent is not changed in any degree from what it would be if the word "heiresses" did not appear, nor does that word suggest or imply children of the testator any more than the word "heirs": *Donnell v. Mateer*, 5 Ired. Eq. 7; *Coon v. Rice*, 7 Ired. 217; *Folk v. Whitney, supra*; *Worrell v. Vinson*, 5 Jones, 91; *Gillis v. Harris*, 6 Jones Eq. 267; 2 Minor's Inst. 351; Washburn on Real Property, 274; note to *Shelley's Case*, 1 Coke, 262.

In our efforts, heretofore, to effectuate what seemed to us to be the real intention of the testators, we followed, to some extent, the case of *Jarvis v. Wyatt*, 4 Hawks, 227. In our further researches we find that case to be questionable authority. Indeed, it has in effect—not in terms—been overruled by numerous decisions. In *Chambers v. Payne*, 6 Jones Eq. 276, this court, commenting on it, say: "Of that case it is only necessary for us to remark that the point decided may be

supported by the peculiar language of the will, or if it cannot be supported on that ground, it must be considered as having been overruled by numerous cases since adjudicated upon the point, to several of which we have already referred."

It follows that under the devise in question Parthenia Leathers took the fee-simple estate in the land described in the pleadings, and that the plaintiff in the action was not entitled to recover.

The prayer of the petitioner must, therefore, be granted. The case must be reheard, and the judgment of this court, entered therein at the February term of 1887, must be set aside, and judgment must be entered affirming the judgment of the superior court.

Prayer of the petitioner granted.

DAVIS, J., dissented, and said that "by the use of the words, 'I give and bequeath to my daughter Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body, one half of three tracts of land,' etc., I think it manifest that it was not only the paramount intent, but the only intent, of the testator to give the land to his daughter for life, with remainder to her children, sons and daughters; but under the rule in Shelley's case, that would not, in the least, alter the construction to be placed upon his will; if he used the words 'the begotten heirs or heiresses of her body' as meaning simply heirs in the technical sense of that word, for I believe it will be conceded that the rule often, and in cases of wills written by unprofessional persons oftener than otherwise, defeats the intent, and the single and only intent of the testator, yet whatever may have been his intent, if he used the words 'heirs' simply, without superadded words to limit or explain its meaning, the technical meaning would follow. From the whole clause of the testator's will, it seems to me quite clear that he used the word, not in any technical sense, but as *descriptio personarum*, and his one intent, and only intent, was to give the land to his daughter for life, remainder to her children. The rule in Shelley's case is based upon the idea that there is in the mind of the maker of the instrument, that comes under its operation, two intents: one a paramount, or general, or legal intent, as it is called; and the other a particular or prescribed intent; and if both intents cannot have effect, the latter must yield to the former: See the question discussed by Pearson, J., in *Ward v. Jones*, 5 Ired. Eq. 400; *Leathers v. Gray*, 96 N. C. 548. It is a rule of construction that when technical words or phrases are used, nothing else appearing, they must be taken in their technical sense, and when the word 'heirs,' or 'heirs of the body,' are used alone, without anything to show that they were not so intended, the technical meaning must prevail, because, standing alone, there can be no other certain meaning given them; but it has been held and is settled in this state that superadded words, 'equally to be divided,' and like qualifying words which show that they were not used in a technical sense, will prevent the operation of the rule in Shelley's case: *Mills v. Thorne*, 95 N. C. 362, and authorities there cited; *Chambers v. Payne*, 6 Jones Eq. 276. Such words are not treated as surplusage, but as aids to show the true meaning of the testator. Suppose the testator in the case before us had added, by way of explanation,

'by heirs and heiresses I mean sons and daughters,' it would clearly have shown that he did not use them in any technical sense, and I apprehend that in that case the rule in Shelley's case would not be insisted on; and yet, it seems to me, that is clearly what he meant, and I cannot conceive of their use by him in a technical sense, unless you treat the word 'heiresses' as surplusage, and if that word, in connection with other parts of his will, tends to show his meaning, I do not see why we should reject it.

"I think we have no right to reject, as surplusage, any word or words used by the testator that may tend to show or aid in showing what he meant. It is his will that must prevail, and if it is apparent that he used a technical word not in a technical sense, the meaning attached to it by him should govern in the construction of the will.

"If it be said that by 'heirs or heiresses' is meant nothing more than heirs, I think the answer is, that it shows none the less conclusively that the words were not used by the testator in the technical sense, importing the class of persons who take definitely as heirs. Whatever in the past may have been the value of the rule in Shelley's case, I think it should be strictly construed when otherwise it would defeat the manifest intention of the testator. I think the tendency of the modern decisions in America is to limit its operation to cases that come technically within the rule, and in many of the states it has been abolished by statute. It is a rule by which the meaning of the testator is construed, and when this meaning is clear, I do not see why it should be defeated by a too liberal construction of the rule of construction. As much as the memory of Coke is to be venerated for his great legal learning, I think with all his faults, if not crimes, while attorney-general, his services in behalf of popular rights and civil liberty in resisting the encroachments and tyranny of the house of Stewart entitle him to far more lasting fame than did his services in the legal war carried on by the bench and bar between the 'Shelleyites' and the 'anti-Shelleyites.'

"The record shows that the merits are with the defendant, who purchased for value, and I regret the more for that reason that I cannot concur in the opinion of my brethren in reversing the former decision, and am glad, in this case at least, a strict adherence to the rule is in the interest of justice."

WHERE TECHNICAL WORDS ARE USED in a will, the testator is presumed to use them in their technical sense, unless a contrary intention is clearly indicated in the context: *Sims v. Conger*, 39 Miss. 231; 77 Am. Dec. 671; *Warner v. Miltenberger*, 21 Md. 264; 83 Am. Dec. 573; *Hoope's Appeal*, 61 Pa. St. 220; 100 Am. Dec. 562, and notes to these cases; *Comfort v. Mather*, 2 Watts & S. 450; 37 Am. Dec. 523.

CONSTRUCTION OF WORDS "HEIRS," "HEIRS OF BODY," or "children," under the rule in Shelley's case: *Ware v. Richardson*, 3 Md. 505; 56 Am. Dec. 762; *Kay v. Connor*, 8 Humph. 624; 49 Am. Dec. 690; *Carr v. Estill*, 16 B. Mon. 309; 63 Am. Dec. 548; *Coursey v. Davis*, 46 Pa. St. 25; 84 Am. Dec. 519, and notes to these cases; *Shimer v. Mann*, 99 Ind. 190; 50 Am. Rep. 82; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; *Combs v. Combs*, 67 Md. 11; 1 Am. St. Rep. 358.

TECHNICAL WORDS IN A WILL. — It is not necessary that technical language should be used to create a trust, but the intention of the testator, if apparent, will be carried into effect: *Anderson v. Crist*, 113 Ind. 65.

WORDS IN A WILL. — "CHILDREN" MAY BE CONSTRUED as equivalent to "issue," in order to effectuate the intention of testator: *Smith v. Fox's Adm'r*, 82 Va. 763.

COWLES v. HARDIN.

[101 NORTH CAROLINA, 333.]

SHERIFF'S SALE — PURCHASER. — Where, at a sheriff's sale, the purchaser is the deputy of the officer selling, but has no connection with or control over the process or the sale made under it, the sale is not void, and such purchaser may convey a good title to other innocent purchasers.

SHERIFF'S SALE. — FAILURE OF SHERIFF to give the defendant in execution the statutory notice of the levy and return thereof is a mere irregularity, which the purchaser at the sale is not bound to notice, and which does not render the sale void. If the debtor suffers injury therefrom, his remedy is against the officer making the sale.

EJECTMENT, by Cowles against Hardin and others. Plaintiff claims title from Murray, a purchaser at sheriff's sale, under execution against Cousins.

C. H. Armfield, for the plaintiff.

Batchelor and Devereux, for the defendants.

MERRIMON, J. The plaintiff showed a grant from the state to one Holsclaw, and a conveyance from the latter to one Cousins.

In order to show title out of Cousins, and in himself, he offered evidence of the following facts: Robert Munday was, in 1857, a deputy sheriff under D. C. McCanless, high sheriff of Watauga County. An execution, issuing upon a judgment rendered by a justice of the peace against Cousins, was, either by the deputy or the sheriff, levied upon the lands of the debtor, returned to the county court, from which a *venditioni exponas* issued, under which the land was sold by the high sheriff, when the deputy became the purchaser, and took the sheriff's deed. It did not appear that Cousins ever had notice of the levy and return, or that an order of sale had been made. Munday took possession and retained it for a number of years, with the knowledge of Cousins.

The plaintiff in this action acquired Munday's title through sale under execution, on a judgment rendered in favor of one Blair.

The defendants asked the court to instruct the jury "that if Robert Munday was a deputy sheriff at the time he made the levy hereinbefore spoken of, and at the time of the sheriff's sale of the twenty-five-acre tract, then the purchase of the land by him would be void, and no title would pass to him by virtue of said sale." The court declined this prayer because it assumes, as a matter of fact, that Munday made the levy,

whereas the evidence was to the effect that he or McCanless, the sheriff, made it, as is admitted by the defendant in his statement of this case. The court likewise declined so to charge, because it was of opinion that, as stated, it was not correct as a principle of law, the sheriff, McCanless, having made the sale, and the same never having been attacked in any way for collusion, fraud, etc.

The defendants also requested the court to charge the jury "that if Cousins had no notice of said levy, or of its return into court, or of the judgment of the county court ordering said sale, then the sale would be void."

The court declined, being of opinion that the principle did not obtain when the defendant in the execution, Cousins, in this instance, had knowledge of the sale under execution, the purchase by Munday, the execution of sheriff's deed, and claim and possession thereunder by Munday until he left the state two years thereafter, and acquiesced therein; and when the rights of subsequent purchaser had intervened, as in the case at bar, the court was of opinion that under the circumstances of this case, when the levy was made and returned, and order of sale was entered by the court, and *venditioni exponas* was issued in pursuance thereof, the law would raise a presumption in favor of this plaintiff—the purchaser at execution sale of Munday's estate,—that all necessary intermediate acts, orders, and decrees were performed and made by the court.

There was a verdict and judgment for the plaintiff, from which the defendants appealed.

It does not appear that the deputy sheriff levied the execution issued by the justice of the peace upon the land in question, but if he did, he had no further connection with it. The *venditioni exponas* issued to the sheriff, and by virtue of it he sold the land, and the mere fact that a person who was the sheriff's deputy, but not charged with selling it, purchased the land at the sale made by the sheriff, could not render the sale void. The buyer—a deputy sheriff—had no official authority in connection with or control over the process, and the sale made under it, and he might bid and buy at it on the same footing as a person without official authority,—indeed as to the sale he had none. If the sheriff and his deputy colluded and perpetrated a fraud in the sale and purchase, the defendant in the execution would have his remedy, but this would not render the sale void *per se*, nor could it affect adversely innocent purchasers.

The statutory regulations pertinent, prevailing at the time of the levy mentioned was made, required that the defendants in the execution should have notice of it and the return thereof, but the absence of such notice was only an irregularity that did not render the sale void. The purchaser was not bound to see that such notice was given, and if the defendant in the execution suffered injury because he did not have it, he had his remedy against the sheriff or other officer. It seems, however, that he had knowledge of the sale, and did not complain of it on that or any account. The purchaser was not bound to take notice of such irregularities: *Burke v. Elliott*, 4 Ired. 355; 42 Am. Dec. 142.

Affirmed.

DEPUTY SHERIFF MAY MAKE VALID PURCHASE at execution sale conducted by his co-deputy: *Worland v. Keinborlin*, 6 B. Mon. 608; 44 Am. Dec. 785, note 788.

NON-COMPLIANCE WITH STATUTORY PROVISION as to the levy and notice does not vitiate the sale. The remedy is against the officer: *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475, note 480; *Evans v. Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701.

PENLAND v. LEATHERWOOD.

[101 NORTH CAROLINA, 509.]

PLEADING AND PRACTICE. — **IN ACTION BY A CONSTABLE** for the wrongful taking of goods from his possession, it is not necessary for him to refer to the writ under which he took possession, in his complaint, nor allege that he obtained any property in or possession to the property by virtue of such writ.

EXECUTIONS. — **WHERE OFFICER HAS LEVIED** upon and has possession of goods, he has a special property therein for the purpose of selling and applying the proceeds to the payment of the judgment specified in the executions levied, and the remainder to the satisfaction of any other executions properly in his hands, even though not actually levied.

EXECUTIONS. — **WHERE OFFICER HAS LEVIED HIS EXECUTION** against property, and has taken it into possession, other officers having like executions may make other constructive levies upon the same property, and though not entitled to its possession, they are entitled to have the property, or the proceeds of the sale thereof, applied to the satisfaction of their executions in their order, after the execution first levied has been satisfied; and it is the duty of the officer making the first levy, and having notice of the second and other constructive levies, to thus apply the property and the proceeds of the sale thereof.

EXECUTIONS. — **WHERE OFFICER HAS PROPERTY** in his hands under an execution levied upon it, and he is wrongfully deprived of such possession, the measure of damages against the wrong-doer is the money due upon the execution levied and that due upon executions in his hands not actually levied, including costs, at the time of the wrongful taking.

DAMAGES. Plaintiff alleges that, as constable, he levied attachments and an execution upon certain goods, and took the same into his possession, whereupon defendant unlawfully seized and forcibly took the same from him, and devoted them to his own purposes. Defendant entered a general denial, and alleged that, as sheriff, he levied executions upon the goods mentioned, and sold the same. The other facts sufficiently appear from the opinion.

George H. Smathers, for the plaintiff.

G. S. Ferguson, for the defendant.

MERRIMON, J. The first exception is without force. It was neither necessary nor proper to mention or to make any allegation in the complaint in respect to the warranty of attachment mentioned. They were produced on the trial as evidence explanatory how the plaintiff came to have possession at first of the property in controversy. It may be that they were unnecessary for that purpose, but no objection was made on that ground. It is not proper, ordinarily, to allege in the pleadings merely evidential facts, whether documentary or otherwise, or the evidence of the plaintiff's cause of action alleged, or of the defense relied upon in the action. The pleadings should state in an orderly way only the facts which constitute the cause of action and the defense.

If the evidence of the plaintiff himself, received on the trial without objection, be accepted as true, then unquestionably he was entitled to recover in this action. He testified that on the eleventh day of December, 1885, he had possession and control of the goods in question, and levied an execution—it must be taken to have been in all respects a valid and proper one—on the same; that in the course of the same day other like executions came into his hands, which he had not levied on the goods at the time the defendant came upon him, as sheriff, seized the property, and forcibly deprived him of the possession thereof.

As the plaintiff so levied upon and had possession of the goods, he had a special property therein for the purpose of selling the same and applying the proceeds of the sale to the payment of the judgment specified in the execution levied, and to the satisfaction of any other executions properly in his hands, though they were not actually levied. The property, by virtue of the levy and seizure thereof, was in *custodio legis*, and might, indeed ought, properly to have been applied to the

execution then in the hands of the plaintiff as constable, although, except as to the first one mentioned, they had not been actually, but only constructively, levied. As the property levied upon was, or the proceeds of the sale thereof under the levy were, in the custody of the law, the officer was required to apply the same properly to the satisfaction of other executions in their order then current and requiring by the exigency of the same such application. The law is true to its purposes, and will not allow its final process, going against the property of individuals, to be disappointed or defeated while it has in its custody and control property or money of the persons against whose property such process goes that ought to serve its purpose.

There can be but one actual levy of one or more executions upon personal property at one and the same time, because the officer in making the same seizes or gets possession and control of it, and has a special property therein and ownership thereof that excludes and prevents other like levies, which levy, however, as we have already seen, places the property in *custodio legis*, to be applied in proper cases, if need be, to other executions. Other officers having like executions may make other levies upon the same property, but these will be constructive in their nature and entitle the officers making them, in their order, to have the property or the proceeds of the sale thereof after the executions under and in pursuance of which the first actual levy proper was made shall be satisfied. It is the duty of the officer making the first levy, and having notice of the second and other constructive levies, to so apply the property and the proceeds of the sale thereof, and the courts will, if need be, compel him to do so. The late Chief Justice Pearson meant no more than this when he said, in *Bland v. Whitfield*, 1 Jones, 125, that "when an officer has already levied and taken the property into possession, a second officer may make a second levy by going where the property is, and making the indorsement on his execution. In this case he has no right to touch the property, and the levy gives him the right to it after the first execution is satisfied." Such a levy is necessarily only constructive. The officer making it cannot get possession of the property until the first levy shall be over. It is the levy of the execution on personal property that creates the lien on the same in favor of the judgment creditor, and hence the proceeds of the sale of the property must be applied to the satisfaction of each execution in the order as to time of

the levy of the same. It is difficult to see how otherwise numerous judgment creditors of their common judgment debtors could have just benefit of executions issued upon their respective judgments going against the debtor's personal property. It is otherwise as to the debtor's real property; as to it, the docketed judgment creates a lien thereon in favor of the creditor, and a levy serves no other purpose than to designate the particular property sold or to be sold: *State v. Poor*, 4 Dev. & B. 384; 34 Am. Dec. 387; *Jones v. Judkins*, 4 Dev. & B. 454; 34 Am. Dec. 392; *Alexander v. Springs*, 5 Ired. 475; *Barham v. Massey*, 5 Id. 192; *Rives v. Porter*, 7 Id. 74; *Freeman on Executions*, secs. 135, 262, 268; *Herman on Executions*, secs. 172, 174.

If, therefore, the plaintiff testified truly on the trial, he had such special property in and ownership of the goods in dispute as entitled him to recover in this action, his measure of damage being the whole sum of money due upon the execution actually levied upon the goods, as well as that due upon the executions in his hands not actually levied, including costs, at the time the defendant seized the goods and took the same from him.

If, however, the defendant, as his testimony tended to prove, levied executions in his hands while the warrants of attachment were in the hands of the plaintiff and levied by him, and before the latter received the executions that first came into his hands, then the property should have been devoted to the executions in the hands of the defendant at that time, and constructively levied, subject to the levy of the warrants of attachment. Or, if the defendant levied constructively the executions in his hands after the plaintiff levied the execution first in his hands, actually or constructively, and before the plaintiff received the executions which he said he did not levy, then the property should have been first devoted to the first execution so levied by the plaintiff; secondly, to the execution first so levied by the defendant; thirdly, to the execution that came into the hands of the plaintiff next after the levy so made by the defendant; and fourthly, to the executions that came last into the hands of the defendant, if he made a proper constructive levy of the same.

There was some evidence tending to show such order of levies, made constructively and successively, after the first actual levy made by the plaintiff.

But the court instructed the jury that the defendant, as

sheriff, could not make such constructive levy of executions in his hands; and, in effect, further, that the plaintiff had the right to devote the property levied upon by him to the satisfaction of the execution that first came into his hands and was levied; and also, secondly, to the execution that subsequently came into his hands, although in the mean time the defendant, as sheriff, may have made a constructive levy of executions in his hands upon the same property. Such instruction was erroneous.

For reasons already stated, the court should have instructed the jury, in applying the law, substantially as it is above stated. The appellant is entitled to a new trial, and we so adjudge.

LIEN CREATED BY SEIZURE OF PROPERTY UNDER EXECUTION is prior and superior to that of every execution subsequently levied, and cannot be defeated by such subsequent levy, though it is made upon a senior execution: *Knox v. Webster*, 18 Wis. 406; 86 Am. Dec. 779, note 783; *Leach v. Pine*, 41 Ill. 65; 89 Am. Dec. 375, note 380.

PRIORITY OF LIENS in case of several executions in the hands of the same officer: *Million v. Commonwealth*, 1 B. Mon. 310; 36 Am. Dec. 580, note 583.

REPLEVIN, WHAT AMOUNT MAY BE RECOVERED in, where property is taken from an officer holding it under execution: *Booth v. Ableman*, 20 Wis. 21; 88 Am. Dec. 730, note 734.

REPLEVIN FROM AN OFFICER. — IN REPLEVIN from an officer who has seized the property under an execution, the extent and validity of his lien, as also the amount of his damages, are matters for the jury, and the court cannot direct a verdict for a certain sum: *O'Connor v. Gidday*, 63 Mich. 630. Where officer attaches property subsequently replevied from him by a stranger, who claims right to its possession, such officer must prove his authority by the writ of attachment in order to show his right to possession, and the measure of damages, if successful in the suit: *Williams v. Eikenberry*, 22 Neb. 210.

STATE v. LAWSON.

[101 NORTH CAROLINA, 717.]

LANDLORD AND TENANT — TRESPASS. — Tenant in possession has the right, in the absence of proof of restrictions upon his tenancy to the contrary, to invite such persons as his business or pleasure may suggest to come upon the premises for any lawful purpose, and one so entering against the will of, and after being forbidden by, the landlord, is not guilty of willful trespass.

INDICTMENT for trespassing on land, contrary to the provisions of section 1120 of the code. The defendant had been forbidden from going on the land by its owner; but the land

was at the time leased, and the defendant's entry upon the land was by the permission of the lessee. The defendant requested the court to instruct the jury that if the entry was at the request of the tenant, their verdict should be not guilty. The instruction was refused, and one given the exact reverse, upon this subject, of that requested. Verdict of guilty.

Theodore F. Davidson, attorney-general, for the state.

R. B. Glenn, for the defendant.

DAVIS, J. It was manifestly the purpose of the act under which the defendant was indicted to keep off intruders, and to prevent willful and unlawful trespasses upon land, and to subject persons, who might so willfully trespass after being forbidden, to indictment for so doing; but as was said in *State v. Hause*, 71 N. C. 518, "when the statute affixed to such a trespass the consequences of a criminal offense, we will not presume that the legislature intended to punish criminally acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction." Even conceding that the possession of the tenant was not such as gave to him authority to invite the defendant to come upon the land, the facts show conclusively that he went only upon that invitation, and this excludes the idea of such willful trespass as is contemplated by the statute. But we think that the tenant, being in possession, had the right, in the absence of any evidence to show that there were restrictions upon his tenancy to the contrary, to invite such persons as his business interest or pleasure might suggest, to come upon the premises so in his possession for any lawful purpose. The possession was rightfully his, and in the absence of any restrictions upon his tenancy he had the right to control the possession for any lawful purpose. If he or his family were sick, might he not send for a physician? and if forbidden by the landlord, would such physician be liable to an indictment for going on the premises to attend a patient?

No such invitation would protect a person from liability for a willful and malicious trespass to the injury of the landlord, if committed under the fraudulent pretense of such invitation. The evidence in this case shows no purpose to commit

such a trespass, and there is error: *State v. Hanks*, 66 N. C. 612; *State v. Crosset*, 81 Id. 579; *State v. Ellis*, 97 Id. 447; *State v. Smith*, 100 Id. 466.

LANDLORD HAS NEITHER ACTUAL NOR CONSTRUCTIVE POSSESSION, during the continuance of the lease, so as to enable him to maintain trespass against a third party entering, but the exclusive possession is in the tenant: *Gibbons v. Dillingham*, 10 Ark. 9; 50 Am. Dec. 233, note 238.

LANDLORD AND TENANT. — THE TENANT, AND NOT THE LANDLORD, has exclusive right of action for any injury to the possession of the rented premises; and this is true whether tenant retains possession or not, because it is his exclusive right of possession that gives him the exclusive right of action: *Walden v. Conn*, 84 Ky. 312. But the landlord, while premises are in possession of tenant for years, may maintain an action against a third party for the diversion of water from a natural stream running through the land: *Heilbron v. Last Chance etc. Co.*, 75 Cal. 117.

STATE v. PUGH.

[101 NORTH CAROLINA, 737.]

ARREST. — POLICE OFFICER ACTING IN GOOD FAITH, and in the line of his duty, in making an arrest and suppressing a fight, may strike a reasonable blow for that purpose; and he is the judge of the force necessary under the circumstances, and not guilty of any wrong unless he arbitrarily abuses the power confided in him. To make him guilty of assault and battery, his act must be grossly unnecessary, excessive, wanton, and malicious.

ARREST. — POLICE OFFICER MAKING ARREST is presumed to act in good faith, and his conduct ought not to be weighed against him in "gold scales."

De Brutz Cutlar, for the appellant.

Theodore F. Davidson, attorney-general, for the state.

MERRIMON, J. The evidence, certainly parts of it, tended to prove that the defendant was a policeman in the line of his duty; that he found the prosecutor engaged in a fight, advancing upon his retreating adversary, one Bailey; that he grasped the prosecutor on the shoulder while he was so engaged, and bade him "consider himself under arrest"; that the latter cast his eye at him, but did not heed the arrest or desist from the fight, but went right on striking at Bailey, and was in the act of striking him when he struck the prosecutor with his club,—one usually carried by policemen,—and that the blow was given to prevent him from striking Bailey.

It was the duty of the defendant to interfere and suppress the fight, and if need be, he might, in good faith, strike a reasonable blow for the purpose. While he had no authority to strike an unnecessary blow, or one greatly in excess of what was necessary for the purpose, and wanton, he was the judge of the force to be applied under the circumstances, and he would not be guilty of an assault and battery unless he arbitrarily and grossly abused the power confided to him; and whether he did or not was an inquiry to be submitted to the jury, under proper instructions from the court. A grossly unnecessary, excessive, and wanton exercise of force would be evidence—strong evidence—of a willful and malicious purpose, but the jury ought not to weigh the conduct of the officer as against him in “gold scales”; the presumption is, he acted in good faith. This is the rule applicable in such cases as the present one, as settled in *State v. Stalcup*, 2 Ired. 50; *State v. McNinch*, 90 N. C. 696, and the cases there cited. So also *State v. Bland*, 97 Id. 438.

The court instructed the jury “that if they believed the evidence of the witnesses, even upon the testimony of the defendant himself, the defendant was guilty, because the prosecutor offered no resistance to the officer, and there was no necessity for the blow.” But there was evidence that the prosecutor persisted in the fight after and while the defendant had hold of him, and he persisted in it until he was forced to desist by the blow. This was evidence of resistance to the officer, and of the necessity to exercise force to suppress further violence. In view of the evidence, the case should have been submitted to the jury substantially as indicated above.

Error.

ARREST, FORCE OR VIOLENCE which officer may exercise in making: Note to *Hawkins v. Commonwealth*, 61 Am. Dec. 161-163; see also *Commonwealth v. Cheney*, 141 Mass. 102; 55 Am. Rep. 448; *Doering v. State*, 49 Ind. 56; 19 Am. Rep. 669; *State v. Dierberger*, 96 Mo. 666; *post*, p. 380; *Braddy v. Hodges*, 99 N. C. 319; *Head v. Martin*, 85 Ky. 480.

OFFICERS ARE PRESUMED NOT TO ABUSE THEIR FUNCTIONS: *Sutherland v. Ingalls*, 63 Mich. 620; 6 Am. St. Rep. 332, and note 334.

STATE v. HARPER.

[101 NORTH CAROLINA, 76L.]

JURY AND JURORS — NEW TRIAL. — Where jurors after balloting without a unanimous result each agree to be bound by the result reached by the majority, and then return a verdict of conviction with two dissenting votes, but upon being polled each answers that conviction is his verdict, the latter will not be set aside and a new trial granted.

JURY AND JURORS — NEW TRIAL. — Verdict will not be set aside on the ground that the jury were improperly approached and spoken to about the case, when the proof offered is in a vague and indefinite form, pointing out no specific act done or words spoken to show a tampering, or that any juror was influenced thereby.

JURY AND JURORS — NEW TRIAL. — Setting aside of a suspicious verdict is in the sound discretion of the court, where nothing more appears, and there is not a legal right denied.

IMPEACHING VERDICT. — **EVIDENCE OF JUROR** is inadmissible to impeach the verdict.

JURY, SEPARATION OF. — Verdict will not be disturbed where one juror in charge of an officer is separated from the other eleven during their deliberations, in the absence of proof of misconduct or undue influence.

Theodore F. Davidson, attorney-general, and John Devereux, Jr., for the state.

SMITH, C. J. The defendant was charged with stealing a hog belonging to one Eli Dorgan, and upon the trial of his plea of not guilty was convicted of the offense, and sentenced to confinement in the state prison for the term of five years, beginning with the second day of April, 1888. After the return of the verdict, his counsel moved to set it aside for alleged misconduct of the jury, to prove which he examined orally one Thomas Harney, whose testimony, under the findings of the court, established the following facts: —

The witness was a regular deputy of the sheriff, and after being sworn was put in charge of the jury. On several occasions he was in the room where the jurors were, and heard part of their deliberations and witnessed the taking of several ballots, in all of which a majority were for a conviction of the defendant, but no unanimity was reached. One of the jurors then proposed that the majority should rule, and this was assented to. Upon a ballot then following, one of the jurors who had favored an acquittal changed his vote and gave it against the defendant, two of them adhering still to a vote for an acquittal. They then "reasoned together," during which the witness left, and another deputy, one Edwards, took his place, and stood at the door of the room. After an absence of about five minutes, the witness Harney returned and resumed his

charge, and soon thereafter he was informed by the jury that they had agreed upon a verdict. The jurors then came into court, and the foreman, on their behalf, gave in a verdict of guilty. They were thereupon polled at the instance of the defendant's counsel, and each for himself gave the same response.

At one time eleven of the jurors, under the officer in charge, left for dinner, and one of their number remained in the room in charge of another sworn deputy. There was no evidence tending to show, nor was there any suggestion, that either deputy conversed with any juror in respect to the testimony, the defendant, or the verdict.

The counsel then offered one of the jurors to testify in reference to the verdict, which the judge refused to permit.

The counsel further proposed to prove by a witness, not of the panel, that during the retirement of the jury some of them were improperly approached and spoken to about the case by an outside party. In the exercise of his discretion, the judge declined to hear further testimony, and refused to set aside the verdict, for the reason that it did not appear that the jury had rendered a majority verdict, nor that the jury had been tampered with, the court being of opinion, however, that the conduct of the officer was not proper, and so stating.

The grounds upon which the court was asked to set aside the verdict, in order to a new trial, are,—1. For that the verdict was the result of the surrender of the convictions of the dissenting jurors to the opinion of the larger number of them, and was not in reality unanimous; 2. For that the judge refused to hear the affidavit offered to show a tampering with the jury; 3. For that he did not rule that the separation of the one juror from the body does not vitiate the verdict; and 4. That the testimony of a juror was refused to show misconduct.

In reference to the first exception, it confronts the fact that the polling shows the assent of each juror to the verdict given in making it unanimous, and the judge who ascertains the fact upon which a reviewing court must proceed finds that the unanimity was not brought about by an involuntary yielding of the convictions of the few to the many, notwithstanding the apparent assent in the jury-room, for immediately thereupon two of the three jurors, upon the vote taken, adhered to their first opinion.

We have had some hesitancy in sustaining the refusal of

the judge to hear the witness, by whom it was proposed to prove that a part of the jury were "improperly approached and spoken to about the case," but upon a more careful consideration we cannot find any reasonable error in his action. The proof offered is in a vague and indefinite form, pointing out no specific act done or words spoken to show a tampering, or that any juror was influenced, or heeded what was done or said, and the setting aside of a suspicious verdict rests in the discretion of the judge, where nothing more appears, and there is not a legal right denied.

In the words of Pearson, J., in *State v. Tilghman*, 11 Ired. 513: "Perhaps it would have been well had his honor, in his discretion, set aside the verdict and given a new trial as a rebuke to the jury, and an assertion of the principle that trials must not only be fair, but above suspicion. This, however, was a matter of discretion, which we have no right to revise."

He proceeds to say in this connection, the inquiry should be: "Was the misconduct and irregularities such as to vitiate the verdict, to make it in law null and void and no verdict?"

The subject is elaborately discussed by Chief Justice Ruffin, and Gaston, J., dissenting, in *State v. Miller*, 1 Dev. & B. 500.

The same doctrine is held in *State v. Morris*, 84 N. C. 756, and in *State v. Brittain*, 89 Id. 481.

The refusal to entertain a proposition and to admit testimony in its support, expressed in such loose terms and without indicating any fact to prove a tampering, were surely within the province of the judge.

If a juror was "improperly approached," and something said to him about the verdict, this is entirely consistent with the regular and proper action of the juror, and may have been unheeded by him in arriving at his conclusion as to the defendant's guilt. It is true the record states that the judge, in his discretion, "refused to hear any further testimony," that is, of the kind that had just been rejected, couched in such general terms and not to prove the fact wherein the tampering consisted, so as to enable him to judge of their tendency and effect in guiding the exercise of his discretion in the premises.

The third and fourth grounds are untenable, and have been so adjudged in several cases. *State v. Morris, supra*; *State v. Brittain, supra*, and others; inasmuch as though present, the

officer had no conversation on the subject of the deliberations of the jury; nor, as the case states, was there any suggestion to the contrary.

The cases cited are on indictments for capital felonies, in regard to which more rigid restraints are put upon jurors, while more control is exercised by the court, and greater freedom tolerated than in trials for subordinate felonies and misdemeanors.

There is no error.

MISCONDUCT OF JUROR AS GROUND FOR NEW TRIAL: Note to *Hilton v. Southwick*, 35 Am. Dec. 254-260.

EVIDENCE OF JUROR IS INADMISSIBLE to impeach the verdict: *Little v. Birdwell*, 21 Tex. 597; 73 Am. Dec. 242, note 250; *Knowlton v. McMahon*, 13 Minn. 386; 97 Am. Dec. 236, note 239; *Withers v. Fiscus*, 40 Ind. 131; 13 Am. Rep. 283; *Woodward v. Leavitt*, 107 Mass. 453; 9 Am. Rep. 49; *Jones v. Parker*, 97 N. C. 33; *State v. Smallwood*, 78 Id. 563; *State of Nevada v. Crutchley*, 19 Nev. 368.

SEPARATION OF ONE JUROR IN CHARGE OF AN OFFICER from the others is not ground for setting aside the verdict: *Haskell v. Mitchell*, 53 Me. 468; 89 Am. Dec. 711, note 713; see also *Trim v. Commonwealth*, 18 Gratt. 983; 98 Am. Dec. 765; note to *McKinney v. People*, 43 Id. 75-87.

STATE v. ELLIS.

[101 NORTH CAROLINA, 755.]

CRIMINAL LAW — EVIDENCE — DECLARATIONS. — Where in a murder trial it appears that the accused and his brother went to the house of the deceased, and waited for him to come home, that while waiting, the brothers sharpened their knives, and while so engaged, one of them declared that "somebody will be surprised to-night," whereupon the accused repeated the remark, such declaration is competent to go to the jury, on the ground that it was made shortly before the homicide, was a part of the conversation, and that the response of the accused made it his own declaration.

CRIMINAL LAW — INSTRUCTIONS. — Where on a trial for murder the court has instructed the jury as to manslaughter and self-defense, it is not error to charge that if the provocation was slight, and the accused used excessive force out of all proportion to the provocation, the killing would be murder, though there was no previously formed design to kill, especially where the immediate circumstances attending the killing is called to the attention of the jury, and the most exculpatory parts thereof are rendered nugatory by the conduct of the accused after the killing, showing absolute want of concern for the deceased after the death blow was inflicted.

Theodore F. Davidson, attorney-general, for the state.

DAVIS, J. The prisoner, Amma Ellis, was charged in the indictment with the murder of James Allen Ellis. It was in evidence that he went to the house of the deceased, who was his father, on the evening of September 4th, when the sun was about one and three quarters or two hours high. The deceased was not at home when the prisoner went to his house, but came later in the evening and before dark.

Susan Ellis, the wife of the deceased and step-mother of the prisoner, testified, among other things, in substance, that she "was at home when the prisoner came; that he complained that Holmes, a younger brother, had been 'scandalizing' him; that he said he was going to stay till the deceased came home and tell him about it, and if he did not whip Holmes, he [the prisoner] would."

There was evidence tending to show the bad temper of the prisoner, and the witness testified that she told him "it was not worth while to wait and have a fuss with his father." It was in evidence that William Ellis (a brother of the prisoner, who had been included in the bill of indictment with the prisoner, but as to whom the grand jury returned "not a true bill") was in company with the prisoner; that each had a knife, which was sharpened at the grindstone; that the prisoner turned the grindstone for William to sharpen his knife, and William turned the grindstone for the prisoner while he sharpened his knife. The witness testified that "while he was grinding his knife, they [prisoner and William] both laughed; William said, 'Somebody will be surprised to-night,' and Amma [the prisoner] said, 'Somebody will be surprised to-night.' They finished grinding their knives, went into the house, got a whetstone and whetted their knives. Then they stood around there till the sun got low."

The prisoner excepted to the admission of the declaration of William Ellis, made while he and the prisoner were grinding their knives. This is the first exception presented in the record.

There was much evidence introduced without objection, as to what was done and said by the prisoner after he went to the house of the deceased and before the deceased came home, tending to show ill-will against his younger brother Holmes (who came home with his father), and also dissatisfaction with the deceased.

The declaration of William Ellis, by itself, would not have been admissible as evidence, but he and the prisoner were

engaged in a conversation; it was shortly preceding the homicide; the declaration was a part of the conversation, and the response of the prisoner made it his own declaration. The conduct of the prisoner just prior to the mortal blow, his acts and declarations, the fact that he had a knife (there was evidence tending to show that "he kept muttering about whipping the boy Holmes, walking about with his knife open"), were competent circumstances to go to the jury, to be considered by them in determining the character of the homicide: *State v. Gooch*, 94 N. C. 987.

"It was admitted that the prisoner killed the deceased with a deadly weapon."

The evidence was conflicting. There was evidence on the part of the state tending to show malice. There was evidence on behalf of the prisoner tending to show that he was going away from the house of the deceased when the deceased rushed upon him and gave him a heavy blow on the back of the head with a thick plank or post, and was in the act of repeating the blow when the prisoner "struck back-handed" the fatal blow.

There was evidence on the part of the state tending to contradict this, and to show that the deceased "had nothing in his hand" when the fatal blow was given; that the deceased "had run across the yard to him [the prisoner] and told him to leave there or he would knock him down"; that he had nothing to strike with but his hand, and the prisoner had the knife open in his hand, and struck the fatal blow.

In charging the jury his honor instructed them, among other things, that it was for them to say "from the evidence, whether the killing was done because of a deliberate intent to kill previously formed, or because of the present provocation, or in self-defense. That if the killing was done with malice aforethought, then it was murder; but if it was done, not because of malice aforethought, but because of present provocation, then it was manslaughter. That if the defendant had started away from the house of the deceased, and the deceased rushed after him and struck him a blow upon the back of the head with a plank or post, and was in the act of striking him again, and the prisoner stabbed and killed the deceased because it was necessary for him to do so to protect his own life or to avoid great bodily harm, then there would be no offense, but the killing would be excusable homicide"; and

upon these several points the testimony of the several witnesses was recited to the jury.

Upon the question of murder, his honor further said to the jury that if the provocation was slight, and the prisoner used excessive force, out of all proportion to the provocation, the killing would be murder, although the prisoner may not previously have formed a design to kill the deceased; and upon this point the testimony of the witnesses as to the immediate circumstances attending the stabbing was called to the attention of the jury, and it was left to them to say whether the provocation was slight, and whether the prisoner used excessive force out of all proportion to the provocation. The prisoner excepted upon the ground that the principle embraced in that part of the charge in regard to provocation and excessive force had no application to this case, and was not supported by any evidence. This is the second exception.

We have not deemed it necessary to set out in detail the evidence as presented in the record; but we think there is no error in the charge of his honor of which the prisoner could complain; for upon a review of all the evidence, we feel constrained to say the most exculpatory parts of it are rendered nugatory by the conduct of the prisoner after the killing, about which there is little conflict.

The prisoner's own evidence shows an absolute want of all concern for the deceased after the blow was inflicted, while other evidence tended to show heartless exultation. It was in evidence that he said: "You may holler, G——d d——n you; I have cut you to your liver"; and that upon the refusal of William to go for the doctor, he said: "That's right."

The charge of his honor was as favorable to the prisoner as the evidence would warrant, and is fully sustained in all its aspects by rulings in *State v. Gooch*, 94 N. C. 982; *State v. Chavis*, 80 Id. 353; *State v. Curry*, 1 Jones, 280; and *State v. Jarrott*, 1 Ired. 76.

Affirmed.

THREATS MADE SHORTLY BEFORE COMMISSION OF A HOMICIDE are admissible in evidence: *Hopkins v. Commonwealth*, 50 Pa. St. 9; 88 Am. Dec. 518, note 524; *Dupree v. State*, 33 Ala. 380; 73 Am. Dec. 422, note 426. But as a general rule, threats made by defendant prior to the murder, to kill some one else besides deceased, are inadmissible: *Carr v. State*, 23 Neb. 749.

PROVOCATION TO REDUCE KILLING TO CRIME BELOW MURDER must bear a just proportion to the act done: *Brooks v. Commonwealth*, 61 Pa. St. 352; 100 Am. Dec. 645, note 651; *State v. Shippey*, 10 Minn. 223; 88 Am. Dec. 70, note 75.

STATE v. CROSS AND WHITE.

[101 NORTH CAROLINA, 770.]

CRIMINAL LAW — CONVICTION OR ACQUITTAL AS BAR TO FURTHER PROSECUTION. — Where the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other.

CRIMINAL LAW — FORGERY — FALSE ENTRY — CONFLICT OF LAWS. — Where the officers of a national bank forge a note, and enter it on the books of the bank as assets, with intent to mislead and deceive the bank-examiner, the state court of North Carolina has jurisdiction to try and punish the makers for the forgery, though the federal courts have exclusive jurisdiction to punish them for making the false entries. The forgery and false entries are distinct crimes.

CRIMINAL LAW — FORGERY — CONFLICT OF LAWS. — The Revised Statutes of the United States, section 5418, providing punishment for the forgery of certain writings for the purpose of defrauding the United States, is directed against frauds attempted to be perpetrated against the government in its fiscal operations, and does not include the forgery of notes or money securities held by banks or individuals against other business corporations or individuals, nor does it include a note forged by the officers of a national bank to deceive the bank-examiner, so as to oust the state courts of jurisdiction to punish the forgery, when it does not appear that the government has any pecuniary interest in the matter, and in the absence of an averment that such note was forged with intent to defraud the United States.

CRIMINAL LAW — FORGERY. — Where forgery is charged against the officers of a bank in falsely uttering bonds and depositing them as assets of the bank, evidence of the financial condition or ownership of the stock of the bank at or prior to the forgery, or of family relations between the parties, is incompetent and insufficient, as the only inquiry is as to the perpetration of the forgery and an intent to defraud.

CRIMINAL LAW — FORGERY. — In charging forgery under section 1191, North Carolina code, it is only necessary to allege an intent to defraud, without designating the person or corporation intended to be defrauded.

CRIMINAL LAW — FORGERY. — Where there is a present intent to defraud, the crime of forgery is complete, whether the expected advantage is to accrue from it to defendant personally or to another, and whether that purpose is successfully attained or not.

CRIMINAL LAW — FORGERY. — Instruction that finding the forged note among the assets of the bank, after the departure of the defendant charged with its forgery, is not a finding that defendant had had possession, and warranted no inference that he knew of, was guilty of, or was in any way connected with, the making of the note, is properly refused, when not authorized by the evidence.

CRIMINAL LAW — FORGERY. — Where the forged paper is such that it might, from its nature, and the course of business, deceive or mislead, to the prejudice of another person, the crime is complete; hence, where the intent to defraud is disclosed by the forged note being made payable to a bank, and put in its possession, and there left when it closed as part of its assets, an instruction that if there was no such resemblance between the genuine and spurious handwriting in the note as would deceive

a man of ordinary intelligence and caution, and for want of similarity in the signatures the note "did not have any legal adaptation to accomplish a legal wrong," the accused could not be convicted, is properly refused.

CRIMINAL LAW — FORGERY. — Where the writing alleged to be forged has the names of two or more attached thereto, it is sufficient to support a conviction if one of them is proved to have been forged.

CRIMINAL LAW — VERDICT. — Where, during deliberation, a juror becomes sick and unable to continue, and the jury announce their inability to agree, but upon being polled, all announce a verdict of guilty on the first two counts and a disagreement on two other counts, whereupon the solicitor for the state enters a *nolle prosequi* as to the latter two counts, and the jury then return a verdict of guilty, there is no reviewable error, for while such method of polling the jury is not to be approved, still the action of the solicitor is, in legal effect, but consent to acquittal on the last two counts, and no injury could result to defendant therefrom.

Theodore F. Davidson, attorney-general, and John Devereux, Jr., for the state.

Walter R. Henry and T. C. Fuller, and E. C. Smith and George H. Snow, for the defendants.

SMITH, C. J. The defendants, Charles E. Cross and Samuel C. White, in an indictment found by the grand jury of the superior court of the county of Wake, are charged as follows:—

"The jurors for the state, upon their oath, present: That Charles E. Cross and Samuel C. White, both late of the county of Wake and state aforesaid, on the eighth day of March, in the year of our Lord eighteen hundred and eighty-eight, and within the jurisdiction of this court, at and in the county aforesaid, unlawfully and feloniously of their own head and imagination, did wittingly and falsely make, forge, and counterfeit, and then and there wittingly assent to the falsely making, forging, and counterfeiting, a certain promissory note for the payment of money, which said forged promissory note is of the tenor following, that is to say:—

"\$6,250.00.

MARCH 8, 1888.

"Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, six thousand two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest at the rate of eight per cent per annum after maturity until paid, for value received, being for money borrowed; the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any

extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, cashier, my true and lawful attorney, to sell any or all collateral he may have in his hands to pay this claim, if I should fail to do so, when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

" D. H. GRAVES.

" W. H. SANDERS.

"And upon the back of which said false, forged, and counterfeit promissory note is stamped and written—D. D.

" D. H. GRAVES,

" \$6,250—July 8.

—With intent to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The second count charges the defendants with feloniously and wittingly uttering and publishing as true a certain false, forged, and counterfeited promissory note for the payment of money, setting it out in the same descriptive words as in the first count, "with intent to defraud," adding, "they, the said Charles E. Cross and Samuel C. White, at the time they so uttered and published the said false, forged, and counterfeit note, then and there well knowing the same to be false, forged, and counterfeited, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The third is in all respects similar to the first count charging the forgery, except that it concludes thus: "With intent to defraud then and there the State National Bank, a corporation then and there duly created and existing under the laws of the United States, contrary," etc., as before.

The fourth count charges a conspiracy with others to defraud the same bank by making, forging, and counterfeiting, and uttering such promissory note, "with intent to defraud," contrary, etc., as in the other count.

At their arraignment for trial at the July term of said superior court, the defendants put in a plea in abatement to the jurisdiction of the court, which is in these words:—

"And the said Charles E. Cross and Samuel C. White, in their own proper persons, come into court here, and, having heard the indictment in the above-entitled case read, do say:—

“That the said court here ought not to take cognizance of the conspiracy and conspiracies, forgery and forgeries, uttering and utterings, in the said indictment specified, because:—

“Protesting each for himself that he is not guilty of the same, as so averred, nevertheless the said Charles E. Cross and Samuel C. White, each severally says:—

“That at the time of the alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, in said indictment specified, there was a national banking association, duly organized and acting under the laws of the United States in Raleigh, Wake County, North Carolina, known as the State National Bank of Raleigh, North Carolina, having its place of business and doing its said business in the said city of Raleigh, in the county of Wake and state of North Carolina, and within the jurisdiction of the circuit court of the United States for the eastern district of North Carolina.

“That the said Charles E. Cross was then and there an officer of said bank, to wit, its president, and the said Samuel C. White was then and there an officer of said bank, to wit, its cashier.

“That said alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, were made, entered into, committed, and done by the said Charles E. Cross, and afterwards assented to by the said Samuel C. White, for the purpose of supporting, sustaining, and making a certain false entry and entries in the books of said bank, and that the said false entry and entries were by the said Samuel C. White, cashier, as aforesaid, acting as cashier, actually made in and upon the books of said bank, the said Charles E. Cross being then and there aiding and abetting, for the purpose of deceiving and with the intent to deceive the agent of the United States, to wit, the bank-examiner of the United States, duly appointed to examine into the affairs of the said association, to wit, the State National Bank of Raleigh, North Carolina.

“That the said note in said indictment specified was never uttered or published in any way nor to any other person or corporation, nor was there any intent or attempt to do so. That the said note in the said indictment specified was entered upon and in the books of the State National Bank aforesaid as the property of the said the State National Bank of Raleigh, North Carolina, and placed among the assets by the said Charles E. Cross and Samuel C. White as aforesaid, for the purpose and with the intent aforesaid.

“ The above facts the said Charles E. Cross and Samuel C. White are ready to verify.

“ Whereupon, they pray judgment of the said court now here, will or ought to take cognizance of this indictment here preferred against them, and that by the court here they may be dismissed and discharged, etc.

(Signed)

“ C. E. CROSS.

“ SAMUEL C. WHITE.”

The plea is verified by their several oaths, and thereupon the solicitor, T. M. Argo, prosecuting for the state, entered a demurrer to said plea, which demurrer, upon argument, was sustained, and the defendants' motion to dismiss the action was denied, and an appeal from the ruling at this stage of the proceeding refused, to all which ruling defendants excepted.

The defendants then each and severally pleaded not guilty of the charges contained in the indictment.

Upon the issue thus joined upon the evidence, after argument and the charge of the court, the jury returned a verdict of guilty as to both defendants upon the two first counts of the indictment, and judgment being pronounced thereon, the defendants appealed to this court, assigning various errors to the rulings of the court during the progress of the trial.

The first exception is to the action of the court in sustaining the demurrer, and disallowing the plea to the jurisdiction of the court.

It is insisted in the carefully prepared brief for the accused laid before us, with an oral argument in its support and a large array of adjudications and other authorities, that (and we copy the words of the contention) “the state court has no jurisdiction over the case at bar. The false entries on the books of the State National Bank of Raleigh, North Carolina, are so false because based upon the forged notes. If the notes are not forged, the entries are not false. To determine the falsity of said entries, the federal court has exclusive jurisdiction. If the state court be conceded jurisdiction to try the defendants for said forgeries, the federal court cannot afterwards try the defendants for the false entries, the forgeries being integral and essential elements in the false entries. The federal court having exclusive jurisdiction to determine the falsity of the entries and to punish the makers thereof, it follows that jurisdiction to try the defendants for said forgeries cannot be conceded to the state court.”

The argument proceeds upon the assumption that the forgery, a misdemeanor of high grade under the laws of the state, being the means by which the false entries are made, and by reference to which the falsity is determined, is so associated with the entries and so merges in them as a constituent element in the offense constituted and punished under the act of Congress as to oust the jurisdiction of the state court to try and punish the forgery as a distinct and separate crime. We shall not question the correctness of the proposition which places the offense of making the false entry on the books of the bank under the sole cognizance of the courts of the United States, and denies jurisdiction to the courts of the state, but we are unable to agree with counsel that this takes from the latter courts the right to try and punish for the distinct and independent crime made such by the laws of the state, notwithstanding the forged note was the instrument employed to give a false coloring to the entry and deceive one examining into the financial condition of the bank. If the note was genuine, but deposited in the bank with the understanding that it was to be surrendered to the makers or canceled as soon as the illegal purpose was accomplished, or if the entry showed a larger sum than was really due, ignoring the credits to which it was subject, and this was knowingly done with the same illegal intent, or if it had been made without the apparent support of any such paper of value, the entry would be false and deceptive, and become a criminal offense under the act of Congress.

The forgery is not then a constituent part of the criminal act of making a false entry, though in the present case preceding the latter in time, and comprehended in the general purpose formed to defraud, and furnishing strong evidence of the unlawful intent in making the entries, and thus misrepresenting the resources and condition of the association when undergoing official examination.

Let us suppose the crime of forgery were a capital felony, or an offense punished with great severity, and the making the false entry one of much milder grade, would the fact that the latter is cognizable in the federal courts, even when, as in this case, no jurisdiction has attached, deprive the state of its right to pursue and punish the offender for the infraction of its own laws in the committing of the higher crime? The question supplies its own answer; and as forgery and making a false entry are distinct and separate crimes, the jurisdiction as-

sumed over the one offense against the state law is entirely consistent with the exercise of a like jurisdiction over the other offense, made such by the act of Congress.

The numerous references made in the brief of defendants' counsel do not conflict with the foregoing view of the law applicable to the facts of the case that we have taken, as upon an examination will appear. The authorities are cited in the brief at page 14, and those most favorable to the view taken for the defendants we propose to examine. It will be seen that none of them refer to distinct and conflicting jurisdictions, but to cases under a single jurisdiction.

In *State v. Shepard*, 7 Conn. 54, it was decided that a conviction of an attempt to commit a rape, under an indictment so charging, was proper when the proof showed the rape was accomplished, and such conviction was a bar to another indictment preferred for the rape. And so it is held in *State v. Smith*, 43 Vt. 324, and the general principle is laid down that when an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution to the other.

In *Drake v. State*, 60 Ala. 43, which was an indictment for an assault with intent to murder, and under it a conviction of an assault and battery without a weapon, a *nolle prosequi* having been entered as to the felony charged is not a bar to the charge of an assault and battery with a weapon, when, with leave of the court, the defendant withdraws that plea and pleads guilty, and he cannot complain thereof. The court say, in general terms, that a single criminal act cannot be split up into two or more distinct indictable offenses, and prosecuted as such.

In *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490, the prisoner was indicted as principal with two others as accessories, for the willful and malicious burning of a dwelling-house, and at the same time charged in another indictment, then found, with arson, in burning the same dwelling-house, and by means thereof mortally burning and killing one Joseph Hopper, who was in said dwelling. On the trial of the charge of arson, the defendant was found guilty. The indictment for murder was then moved; thereupon the prisoner interposed the defense of a conviction of the offense of arson.

The court sustained the plea, declaring that the killing being unintentional and a simple consequence of the burning,

the conviction for the burning was a bar to the second indictment, charging a homicide as an accidental but not intended assault, and that the offenses were so essentially one that the prisoner could not be punished for the second imputed crime.

In the case of *State v. Chaffin*, 2 Swan, 493, it is held that after a fine imposed for an assault, a person could not be indicted for an assault and battery, there being but a single act.

In *State v. Shelley*, 11 Lea, 594, it was held that a person swearing falsely in a case pending before a United States commissioner, exercising his functions as such judicially, could not be tried for the perjury then committed before the tribunal of a state, the jurisdiction vested in the federal courts being exclusive.

The same conclusion is reached and announced in *State v. Pike*, 15 N. H. 83.

The principle is extended and applied to actions for a penalty given by an act of Congress in reference to license for retailing spirituous liquors, in *United States v. Lathrop*, 17 Johns. 4.

We now proceed to consider the cases referred to in our own reports.

In *State v. Ingles*, 2 Hayw. (N. C.) 4 (148), the indictment for a riot, and for beating and imprisoning one Barry, was resisted upon the plea of a former conviction for an assault and battery grounded on the same fact. The court say that "the state cannot divide an offense consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for the offense compounded of them all," and so the plea was held good.

In *State v. Lewis* (a slave), 2 Hawks, 98, 11 Am. Dec. 741, two bills of indictment were found against the prisoner at the same time,—one for burglary and larceny, the other for robbery,—and both charged the felonious taking of the same goods. On the first, the prisoner was convicted of the larceny only. It was ruled that he could not be tried on the second indictment, because it would be twice putting him in jeopardy for the same crime.

In *State v. Commissioners of Fayetteville*, 2 Murph. 371, the defendants were tried and convicted for not keeping one of the streets in the town of Fayetteville in repair, and there were three other streets in the same condition, for the neglect

to repair which three other separate indictments had been found, the conviction was relied on as a bar to the other indictments, and the plea was sustained. "It would be monstrous," says the court, "to charge them with separate indictments for every street in the town, when the whole were out of repair at the same time, especially when, upon one indictment, a fine can be imposed adequate to the real estimate of the offense." The imputation is of negligence as the distinctive offense, though shown as applicable to different streets, just as an overseer is guilty of but one offense in neglecting to keep his road in repair as a whole, and not as many offenses as there are parts of it out of repair and needing amendment.

So, if a person has been tried for an affray, he cannot again be prosecuted for an assault and battery committed in making the affray: *State v. Stanly*, 4 Jones, 290. And similar ruling was made when the assault was made in a riot, and given in evidence to prove the riot in an indictment for the latter offense.

None of these cases to which our attention has been given go beyond these adjudications, and they clearly recognize the distinction which we have drawn in examining the case before us, where the offenses are not only cognizable in different tribunals, but distinct and independent themselves, of either one of which a party may be guilty, and not guilty of the other. The principle is not affected by the fact that the spurious character of the note may supply forcible if not invincible evidence of the *mala fides* and fraudulent purpose of the act of making the false entry.

It is furthermore insisted that the forgery of the note, as a substantive crime, made, as alleged, to defraud the United States, can be prosecuted only in the courts of the United States, under section 5418 of the Revised Statutes of the United States. The enactment is in these words: "Every person who falsely makes, alters, forges, or counterfeits any bid, proposal, guaranty, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, or utters or publishes as true any such false, forged, altered, or counterfeited bid, proposal, guaranty, official bond, public record, affidavit, or other writing, for such purpose, knowing the same to be false, forged, altered, or counterfeited, or transmits to or presents at the office of any officer of the United States any such false, forged, altered, or counterfeited bid, pro-

posals, guaranty, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited for such purpose, shall be imprisoned at hard labor for a period not more than ten years, or be fined not more than one thousand dollars, or be punished by both such fine and imprisonment."

Very similar in terms is section 5479, in the same chapter 5 of title 70, entitled "Crimes against the operations of the government."

From the entire context and the carefully constructed sentence or section itself, it is manifestly directed against frauds attempted to be perpetrated on the government in its fiscal operations, as the entire chapter shows. The section nowhere mentions promissory notes or money securities held by banks or individuals against other business corporations or individuals, and the careful enumeration of the things to be forged, and the leaving out bills and notes, in which are formed relations between the debtor and payee or holder, are significant of the scope and limitations of the enactment.

The expression, "or other writing," following the enumeration, must find a restriction in the class to which it belongs, and the obvious scope of the operation of the section as an entirety. It does not include in our interpretation of the clause, "for the purpose of defrauding the United States," a commissioner sent to look into and report the condition of the bank, when it does not appear that the government has any pecuniary interest in the matter, and is only exercising, through this agency, a supervisory power over these institutions to secure their fidelity to duty and the safety of the public.

But if it be conceded that such a promissory note is embraced, it is only such as are forged or counterfeited to defraud the United States, and an averment to that effect is necessary to withdraw such forgeries from the general jurisdiction of state courts. Such notes alone are transferred to the jurisdiction of the federal courts, leaving all others, where such intent does not enter into the criminal act, to the judicial tribunals of the state. The absence of this indispensable prerequisite in any averment contained in the plea in abatement precludes the defendants from insisting that the forgery does not belong to the jurisdiction of the state, for it is not all forged notes that can only belong to and be tried in the federal court, but such as are made for the unlawful purpose specified in the statute, and therefore, the plea does not show an excluding jurisdic-

tion, and take away that of the court: See *Coleman v. Tennessee*, 97 U. S. 509.

The exceptions numbered from 8 to 24 inclusive are taken to the refusal of the court to permit evidence proposed to be given, that the stock of the bank belonged to the family of the late John G. Williams, its founder, and to one of whose daughters the defendant Cross was married, while the defendant White was the brother of the widow of the deceased, and offered to repel the charge of an intent to defraud the bank; and further, as to the previous condition of the bank under the management of former presidents.

We think the testimony was properly rejected. The simple inquiry was as to the alleged forgery of the note set out in the indictment, and the fraudulent purpose for which it was intended to be used, and was in fact used in covering up the real condition of the institution, and supplying spurious in place of its wasted resources. To this end, the forgery was committed as a method of effectuating the purpose, and placed as if genuine among the assets. This use of the paper involves the intent to defraud some one; and under our statute (Code, sec. 1191), a general charge of an intent to defraud without designating the person or corporation intended to be defrauded is sufficient.

The intent to defraud is involved in the making and using the forged instrument as if genuine, and this purpose is not repelled by the existence of family relations among the parties, nor does the evidence tend to disprove the presence of the fraudulent intent in the act to which it is an inseparable incident. Whatever misconduct of others, previously intrusted with its management, may have led to the disastrous condition in which, in assuming the presidency, the defendant Cross found it, no defense nor extenuation in law is afforded by its necessities for the criminal act committed, and inquiries in that direction were wholly out of place in this prosecution.

Again, other notes, alleged to be spurious, and found among the assets of the bank, the state proposed to prove in support of the charge of conspiracy, and to show the *scienter*, and after objection, was allowed to do so.

For this purpose only it was competent, and for this purpose alone the proof was admitted. But it became immaterial, inasmuch as no conviction was had upon the charges it was offered to support.

We dispose of the other exceptions relating to the evidence with the single remark that they are equally untenable as the others, and we next proceed to examine the instructions which were tendered and refused, as also such as were addressed to the jury, so far as they are not embraced in what has been already said.

The first three refused instructions are of the class referred to in the preceding remark as having in their import been before examined.

The fourth relates to the charge of conspiracy, which is put out of the way by the verdict.

The fifth asserts, as a proposition of law, that if the note was forged, not for the benefit of the defendants, nor was any money obtained thereon, but merely to create a false idea of the condition and solvency of the bank, and the jury so believe, the defendants are not guilty.

5. The proposition is an erroneous statement of the law, for if the forgery was committed with a present intent to defraud, the offense was complete, whether the expected advantage was to accrue from it to the defendants personally or to another, and whether the purpose was successfully attained or they failed in it.

6. The sixth instruction is substantially the same as must be our ruling upon it.

7. The court properly declined to tell the jury that the finding the note among the assets of the bank, after the departure of the defendants, was not a finding that the defendants had had possession, and warranted no inference that the defendants knew of, were guilty of, or were in any way connected with the making of the note.

The tenor of the evidence did not authorize the giving any such direction, and the jury were to draw their conclusions, not from one isolated fact, but from all that was shown.

9. If there was not such resemblance between the genuine and spurious handwriting of Graves and Sanders appearing in the note as would deceive a man of ordinary intelligence and caution, and for want of similarity in the signatures the forged note "did not have any legal adaptation to accomplish a legal wrong, the person could not be convicted."

This proposition would excuse an act of forgery in every case, even when the fraud had been consummated when the person upon whom it was practiced was unacquainted with the handwriting of one whose signature it purported to be,

and who reposed confidence in the genuineness of the paper. The variation in the writing may be evidence of the absence of an intent to defraud, but not when the intent has been developed in the act of defrauding. It was in this case made payable to the bank, and put in possession of the bank, and there left when its doors were closed, as part of its resources. Besides, the variance was not so marked as to call for such a direction, nor does it find support in the case of *State v. Covington*, 94 N. C. 913; 55 Am. Rep. 650. Precisely such an instruction was declined in that case in words almost identical, and the ruling affirmed on appeal; Merrimon, J., speaking for the court, in the conclusion of his remarks upon this point, thus: "If, therefore, the false and fraudulent paper-writing be such that it might, from its nature and the course of business, deceive or mislead to the prejudice of another person, the offense of forgery would be complete."

The remaining instruction refused was, that if only one of the names signed to the notes is shown to be forged, and the evidence not satisfactory of the forgery of the other, there is a fatal variance, and the verdict must be for the defendants.

The contrary has been expressly decided in the cases of *State v. Gardiner*, 1 Ired. 27, and *State v. Davis*, 69 N. C. 813, and we are content with the mere reference to them.

It will conduce to a more correct understanding of these exceptions and the rulings upon them to reproduce so much of the charge delivered in place of that asked and refused as relates to the same subject-matter, and which is also excepted to in detail.

After explaining the separate charges made in the several counts of the indictment, and defining the offense of forgery, the court says:—

"If the jury should be satisfied, beyond a reasonable doubt, from the testimony, that either of the defendants forged or altered the note set forth in the bill of indictment with intent to defraud any individual or corporation whatever, then such defendant would be guilty as charged in the first count of the bill of indictment.

"If the jury should be satisfied in the same way, beyond a reasonable doubt, that either of the defendants aided or abetted another in falsely forging or altering said note, or assented to the false forging or altering said note after it had been forged by another, with intent to defraud any person or

corporation whatever, such defendant would be guilty, in manner and form, as charged in the first count.

"If the jury are satisfied beyond a reasonable doubt that either of the defendants did utter and publish said note, knowing it to have been forged or altered with intent to defraud any person or corporation whatever, then such defendant would be guilty as charged in the second count.

"If the signature of the name of D. H. Graves to the note did not resemble his own proper signature, that is a circumstance that the jury may consider in determining whether there was an intent on the part of either of the defendants to defraud said Graves. But if his name was written by either of the defendants to said note for the purpose of defrauding any person, or if either of the defendants assented to the writing of such name by another than Graves with said intent, then such defendant would be guilty, whether the signature bore such resemblance to that of said Graves as would probably deceive any person acquainted with his handwriting as to the genuineness or not. The rule in reference to the adaptation to deceive in such cases applies only to counterfeit money, or currency, or coin."

We find nothing in this series of directions of which the defendants can justly complain, and what has been already said disposes of these exceptions also. But if there was an erroneous statement of the law in one particular, while it was correctly laid down in other parts of the single instruction, it would be unavailing according to our own and the rulings in the United States supreme court: *Bost v. Bost*, 87 N. C. 477; *Williams v. Johnston*, 94 Id. 633; *Johnston v. Jones*, 1 Black, 209; *Lincoln v. Claflin*, 7 Wall. 182.

We have omitted to advert to the charge in so far as it refers to the second and third counts, for the reason that no verdict was demanded or rendered on them, as will hereafter appear, and no harm has come to the defendants in consequence.

The last and remaining objection disclosed in the record has reference to what transpired at the rendition of the verdict. The facts are these: The jurors having retired to consult upon their verdict, sent a message through the officer put in charge of them, signed by one of their number, to the effect that it was impossible for them to agree, and this juror stating that he had been suffering for a day or more with sick headache caused by indigestion, and did not feel able to continue

longer. The jurors were thereupon brought before the court by order of the judge, and the court, in the exercise of its discretion, in the presence of the defendants, proceeded to poll the jury, to the doing of which the defendants excepted. In polling the jury, the judge first inquired of the whole body whether they could agree, and the foreman answered that they could not. Then each juror, as his name was called, was asked, "What say you — are the defendants, or either of them, guilty in the manner and form as charged in the bill of indictment, or not guilty?" To this, exception was also taken. When the process of making the separate inquiry of each was concluded, it appeared from the answers that all the jurors were agreed upon a verdict of guilty against both defendants upon the first and second counts, while two of the number were for finding them not guilty upon the third and fourth counts. The solicitor thereupon proposed, in presence of the jury, to enter a *nolle prosequi* to those counts. The jury withdrew, and, after argument from the solicitor, he was authorized to make the entry. Upon the return of the jury to the court-room, they were informed by the judge of the allowance of the entry, and that they need only pass upon the charges contained in the first and second counts. After again retiring, they returned in charge of the officer into court, and for their verdict say the defendants are guilty. The jury was again polled, at the instance of the defendants' counsel, and asked, each juror, as to the verdict, and each responded, "Guilty." Exceptions were made to each step taken in the action of the court; and further, that the verdict, though so ordered by the court, was a general and not a special verdict. The court finds, as a fact, that the jury were not ordered to find a special verdict. While we do not approve of the mode adopted to ascertain the individual opinion of each juror before an agreement has been reached by the entire body, even to ascertain whether there are insurmountable difficulties in the way of arriving at unanimity and they should be discharged, a discretionary power rested in the judge, because of its possible injurious effect upon the minds of the dissenting jurors, there is no error in law committed, and it is apparent no injury has come to the defendants by eliminating so much of the charge as was abandoned by the solicitor. He had no right to enter a *nolle prosequi* in its strict legal sense, which, like a nonsuit in a civil action, would leave the defendants exposed to another prosecution for the same offense. The action of the

solicitor is miscalled, but in legal effect it was a consent to an acquittal of the accusations in the specified counts, and such is the result of a failure to render a verdict upon some of several counts in an indictment: *State v. Taylor*, 84 N. C. 773; *State v. McNeill*, 93 Id. 552; *State v. Bowers*, 94 Id. 910; *State v. Thompson*, 95 Id. 596.

The last case shows also that a general verdict may be construed in the light of instructions given by the judge, and though general in terms, will, in legal effect, be restricted to such alone of the counts as the jury were directed to pass on, a ruling sanctioned in the case of *State v. Long*, 7 Jones, 24, and *State v. Leak*, 80 N. C. 403.

The questioning of the jury revealed the fact of an entire unanimity upon the first two charges, the result of their deliberation before coming into court, and a readiness to render a verdict accordingly. The abandonment of the others for the purpose of ending the cause was so far favorable to the defendants as to operate as a partial acquittal, and did not, nor could of itself, work any injury to them: *State v. John*, 8 Ired. 330; 49 Am. Dec. 396.

There was no reviewable error in what transpired, but the granting of a new trial after setting aside the verdict rested in the sound discretion of the presiding judge, which he has seen fit to exercise in refusing the application for it. The motions in arrest of judgment for supposed defects in the form of the indictment were properly overruled, for it substantially follows approved and recognized precedent, except so far as modified by statute in reference to the averment of an intent to defraud, which it sanctions without further designation. We have thus carefully perused the record and examined the numerous exceptions taken during the progress of the trial, pressed with great earnestness in the argument on the appeal, in which a very thorough research among the reports and elementary writers has been apparent; and yet our convictions as given in this opinion are clear and strong that the accused have had an impartial trial, and the result must stand. There is no error, and the judgment must be and is affirmed.

FORGERY, WHAT SUFFICIENT TO CONSTITUTE: *State v. Johnson*, 26 Iowa, 407; 96 Am. Dec. 158, note 164; *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760, note 764.

FORGERY, INDICTMENT FOR, WHAT MUST ALLEGE: *State v. Johnson*, 26 Iowa, 407; 96 Am. Dec. 158, note 164; *Luttrell v. State*, 85 Tenn. 760; 4 Am.

St. Rep. 760, note 764. Where an indictment for forgery described the instrument alleged to be forged as an acquittance and discharge for money, and set forth a bill of parcels purporting to be receipted, the instrument was not misdescribed: *Commonwealth v. White*, 145 Mass. 392. The indictment for forgery is sufficient which charges the offense with such degree of certainty as to enable the court to pronounce a proper judgment in case of conviction; but indictment must set out the forged instrument with literal accuracy, or state good reasons for the omission to do so, and the instrument thus set out must be proved with like accuracy: *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760. Indictment for forging school warrant need not allege that the school district was a corporation: *Ball v. State*, 48 Ark. 94. Failure to allege value of property obtained by reason of the forgery does not invalidate indictment: *Stewart v. State*, 113 Ind. 505.

ACQUITTAL OR CONVICTION as bar to further prosecution for a crime growing out of the same act: *State v. Cooper*, 13 N. J. L. 361; 25 Am. Dec. 490; *Dunkey v. Commonwealth*, 17 Pa. St. 126; 55 Am. Dec. 542; note to *Roberts v. State*, 58 Id. 536 et seq.; *Ball v. State*, 48 Ark. 94; *State v. Blahut*, 48 Id. 34.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

SCHWENK v. KEHLER.

[122 PENNSYLVANIA STATE, 67.]

CONTRIBUTORY NEGLIGENCE OF PARENT. — Plaintiff is chargeable with contributory negligence, and is not entitled to recover for injuries sustained by his minor son while in the employ of the defendants, if, knowing that the work was dangerous, he permitted his son to continue in it, without objection.

IT IS ERROR TO INSTRUCT JURY IN SUCH WAY AS TO PRACTICALLY WITHDRAW OR NULLIFY CHARGE PROPERLY GIVEN as to plaintiff's contributory negligence, by a reference to a general charge, which stated that the question was whether the defendants provided suitable appliances, and if they did not, then the jury were to determine the plaintiff's damages, but if the appliances were of an ordinary character, the verdict should be for the defendants.

CASE by Charles Z. Kehler against William Schwenk, George Robertson, and Jacob Geise, partners engaged in coal-mining, to recover damages for injuries sustained by plaintiff's minor son Daniel, through the alleged negligence of the defendants. Daniel, who was about fourteen years of age, was taken into the employment of the defendants, in September, 1882, at the request of the plaintiff, and placed to work at slate-picking. The plaintiff gave directions at the time that his son should not be put to more dangerous work. A short time afterwards, however, the boy was sent out of the slate-room to assist in hauling the dirt out upon the dump. The father, learning of this, remonstrated with one of the defendants, and the boy was accordingly returned to his former employment. On September 12th, the defendant Robertson went to the slate-room and directed the foreman in charge to send out a boy to

assist with the dump-car, and the foreman ordered Daniel out. It was necessary that the mule attached to the dump-car should be driven rapidly, and detached at some distance from the dump, in order to give the requisite momentum to the car to carry it to the end of the track. To detach the mule, young Kehler was obliged to step in front of the moving car, detach the hook, and allow the mule to step to one side. On the afternoon of September 13th, while he was thus engaged, he was caught by the car, thrown beneath it, and his right arm crushed so as to render amputation necessary. The plaintiff's testimony went to show that the defendants failed to provide suitable appliances for hitching and unhitching the mules, and he also admitted that he knew that his son was engaged on the dump-cars on the 12th; while the defendants introduced evidence to the effect that the appliances were those ordinarily in use, and were safe, and that the plaintiff had full knowledge of their character, and of the employment of his son on the dumps, and made no objection. The general charge of the court sufficiently appears in the opinion. The defendants' first and second points referred to were as follows: 1. That the plaintiff, having shown, by his own testimony, that he hired his son to the defendants, and that he saw him on September 12th engaged on the dump-cars similar to those on which he himself was working on that day, and that he did not notify the defendants, or their foreman, of his unwillingness to have his son work in that position, he thereby assented to his employment in the business he was engaged in at the time of the injury, and cannot recover. To which the court answered: "Under the evidence in the case, I leave it to the jury to determine whether the plaintiff assented to his son's employment in the business he was engaged in at the time of the injury, and I refer you to what I have said in the general charge on this subject. If he did so assent, he cannot recover." 2. That the plaintiff, having hired his son to the defendants, and having testified that he knew or believed that the work on the dump-cars was dangerous, and protested against his future service thereon, in pursuance to which protest the defendants removed his son to work in the breaker, yet having shown that he saw his son working again on the dump-cars on September 12th, and permitted him to continue working, he was guilty of contributory negligence, and cannot recover. To which the court answered: "If the plaintiff, knowing that the work on the dump-car was dangerous, permitted

his son to continue working on the same, he was guilty of contributory negligence, and I charge you as requested, but I refer you to the general charge." The plaintiff had a verdict, and judgment being entered thereon, the defendants brought error.

S. P. Wolverton and W. B. Faust, for the plaintiffs in error.

C. R. Savidge and Voris Auten, for the defendant in error.

WILLIAMS, J. Daniel Kehler, a lad of about fourteen years, was injured at the colliery of the plaintiffs in error. The plaintiff is the father of Daniel, and brought this action to recover for loss of service of his minor son in consequence of the injury sustained. The negligence imputed to the defendants in the court below was the failure to provide suitable appliances for hitching and unhitching the mules to and from the dumps in which the dirt and refuse were taken to the dirt-piles. The defendants below denied that the appliances were unsuitable, asserted that they were in the usual form, and that the plaintiff, having full knowledge of their character and of the employment of his son upon the dumps, and making no objection thereto, was guilty of contributory negligence, and could not recover, even if the jury should find the appliances to have been unsuitable.

This subject was brought to the attention of the court by the first and second points of the defendant, and the court correctly instructed the jury, in answer to the second point, that "if the plaintiff, knowing that the work on the dump-car was dangerous, permitted his son to continue working on the same, he was guilty of contributory negligence, and I charge you as requested, but I refer you to the general charge."

In the general charge, after a review of the questions raised, the learned judge said: "Now, gentlemen of the jury, taking in consideration all these facts and circumstances as detailed in evidence as to the manner of young Kehler's employment and the circumstances under which he went out upon the dirt-bank to work, it seems to me that the question to be determined after all is, whether the defendants did adopt and maintain suitable instruments in this case,—suitable cars, with proper or suitable hooks or appliances," etc. Again, in the concluding part of the charge, the learned judge instructs the jury as follows: "Now, gentlemen of the jury, I leave all these facts to be determined by you from the evidence in the case. If you find in favor of the plaintiff, that is to say, if you find

that the defendants did not adopt and use suitable instruments and appliances to their cars, . . . and that, in consequence thereof, an injury was sustained by the plaintiff's son, then you will determine what amount of damages the plaintiff is entitled to recover. But, as I have already stated, if these hooks, rings, and appliances to the dumps were of an ordinary character, . . . your verdict should be in their favor."

We are of opinion that the complaint made by the plaintiffs in error, that the answers to the first and second points of the defendants below submitting to the jury the question of the plaintiff's contributory negligence were practically withdrawn or nullified by the general charge to which they were referred, is well founded. It was important that the jury should have their attention drawn distinctly to the sufficiency and suitability of the method of unhitching the mules from the dump-cars in use at this colliery, for the question of the negligence of the employer depended upon whether he had made reasonable provisions for the safety of his employees. But it was equally important that the attention of the jury should be drawn to the other question, whether, if the employers were guilty of negligence, the plaintiff was not chargeable with contributory negligence in permitting his son to continue in a dangerous employment, he having, as appeared from his own testimony, knowledge of the manner in which the dumps were handled, and of the fact that his son was employed upon them.

While the answers to the points raising this question are correct, their reference to the general charge, and the great prominence given in the general charge to the other question, that of the negligence of the employers, are calculated to obscure or minimize the question of the contributory negligence of the plaintiff. In effect, it is as though the court had said to the jury, "The controlling question in this case is, whether the defendants provided suitable appliances for their cars, and if you find they did not, you should determine what amount of damages the plaintiff has sustained." The learned judge did say this, substantially, when he said: "It seems to me that the question to be determined after all is, whether the defendants did adopt and maintain suitable instruments," etc. The jury would naturally understand from the language of the general charge that the opinion of the judge was, that the other questions raised were relatively of little importance, and ought not

to stand in the plaintiff's way, if, upon the question of the suitability of the appliances used upon the dump-cars, they should find for the plaintiff. This was not an adequate presentation of the defense, and for this reason the case must go back for another trial.

Judgment reversed, and *venire de novo* awarded.

NEGLIGENCE of parent, whether imputed to child: *Pratt Coal and Iron Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 754, and note.

PARENT AND CHILD.—Parents permitting child to be in streets, effect of, if child is injured: *Bliss v. Inhabitants etc.*, 143 Mass. 91; 1 Am. St. Rep. 442. Father knowingly permitting child of tender age to go upon railroad track is guilty of culpable negligence: *Pratt Coal and Iron Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 754; *Reilly v. Hannibal etc. R'y Co.*, 96 Mo. 601.

HENCH v. AGRICULTURAL INSURANCE COMPANY.

[122 PENNSYLVANIA STATE, 128.]

INSURANCE—COVENANT AGAINST ENCUMBRANCES.—A covenant avoiding the policy if the property insured should become encumbered by mortgage, judgment, or otherwise, without the company's consent, is broken when an encumbrance falls upon the property, whether with or without the actual knowledge of the insured.

DEBT by Benjamin A. Hench, for the use of Emanuel Toomey, against the Agricultural Insurance Company, upon a policy of fire insurance issued to Hench, and payable to Toomey in case of loss, as his interest might appear, under certain judgment liens existing at the time on the property insured. The policy contained a provision that "if the property, either real or personal, or any part thereof, shall become encumbered by mortgage, judgment, or otherwise, . . . then, and in every such case, and in either of said events, this entire policy, and every part thereof, shall be null and void, unless the written consent of the company at the Baltimore office is obtained." Hench afterwards executed two notes to one Kleckner, with warrants of attorney to enter judgment, but it was understood that judgment would not be entered. Kleckner, however, without the plaintiff's knowledge, subsequently caused judgment to be entered as liens upon the insured property, and of which no notice was given to the company. A loss having occurred, the plaintiff brought this action. By arrangement between the parties, the question of law was reserved for the court, whether, under the uncontradicted facts,

the plaintiff was entitled to judgment. Judgment having been given for the defendant, the plaintiff brought error.

William H. Sponsler and W. A. Sponsler, and J. L. Markel, for the plaintiff in error.

W. N. Seibert, for the defendant in error.

PAXSON, J. This case is distinctly ruled by *Seybert v. Pennsylvania Mutual Fire Ins. Co.*, 103 Pa. St. 282, and *Pennsylvania Mutual Fire Ins. Co. v. Schmidt*, 119 Id. 449, in which it was held that a covenant against encumbrances in a fire policy is broken the moment an encumbrance falls upon the property insured, whether the assured has or has not actual knowledge of such encumbrance. In the present case, as in *Pennsylvania Mutual Ins. Co. v. Schmidt*, *supra*, the assured alleged that he had no knowledge of the entry of the judgment in question; that, in point of fact, the holder thereof had agreed not to enter it. That is a matter between the assured and the person who entered a judgment against him in violation of his agreement. What has the company to do with this? It cannot be affected by the act of third parties with whom it has no relations, and of which it has no knowledge. An assured who covenants against encumbrances must keep his covenant precisely as every other person, and it is his business to see that no encumbrances fall upon his property. If an additional encumbrance does so fall, let him notify the company, and pay the increased premium, if demanded, or make his peace with them in the best way he can. Upon his failure to do so, we cannot help him.

I do not see how I can make the matter any clearer than was done in the cases cited. If the profession do not understand them, it must be by reason of my obscure way of stating legal principles.

Judgment affirmed.

INSURANCE. — Mortgage is not a sale or transfer of title within the prohibition of an insurance policy: *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606; 25 Am. Rep. 623; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; 27 Am. Rep. 582; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. St. Rep. 582; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; 5 Am. Rep. 115. There was no breach in warranty against encumbrances where insured, in her application, so warranted, and where there were four judgments against the property which were not satisfied of record, but two of which had been actually collected by sheriff and paid over to judgment creditors, and the judgment debtor in the other two held receipts of judgment creditors acknowledging satisfaction: *Lang v. Hawks etc.*, 74 Iowa, 673.

APPEAL OF LATSHAW.

[122 PENNSYLVANIA STATE, 142.]

PARTITION OF LANDS PURCHASED FOR SPECIAL USE. — One tenant in common cannot, without the consent of his co-tenants, have a partition of lands which they have devoted to a particular use, which use enters into the consideration of the contract creating it; and this rule applies, and perhaps *a fortiori*, where the use is charitable.

PARTITION. — ONE CONGREGATION CANNOT, WITHOUT CONSENT OF OTHER CONGREGATIONS, HAVE PARTITION OF LANDS, purchased by all for their common benefit, for a parsonage and glebe; and especially where the lands were conveyed to trustees of the different congregations for the benefit of a "ministerial charge," thus creating an active and continuing trust, the fee remaining in the trustees as long as the charge continues.

ACTIVE TRUST — FEE REMAINING IN TRUSTEES. — Fee ordinarily vests at once in the association, when a deed is made to trustees for a church or other charity; but this is not so where the trust is active and continuing, as where it is created for the support of a special use.

BILL in equity by the trustees of St. Peter's church and congregation against the trustees and congregations of David's, Himmel's, St. Paul's, and Emmanuel churches, praying for a commission of partition of a tract of land conveyed to the trustees of the various congregations by a deed which recited: "Which several named Lutheran congregations form the Mahanoy Lutheran Ministerial Charge of said county of Northumberland." The property had been purchased by the five congregations, for their common benefit, for a parsonage and glebe, and was devoted by them to that use, until the St. Peter's congregation refused the services of the common pastor, and withdrew from the charge. The bill was dismissed on the report of the master, and the complainants appealed.

S. P. Wolverton, George Hill, and J. Nevin Hill, for the appellants.

S. B. Boyer, for the appellees.

GORDON, C. J. Whilst it may be admitted that partition is an incident of tenancies in common, a right which vests in the several tenants by virtue of the title by which they hold, yet, like every other mere legal right of which persons may be possessed, it may be waived by the contract of the parties. Partners may purchase land for the use of the partnership, and take title thereto as tenants in common, and yet, during the continuance of the firm, it would, I suppose, hardly be contended that one of the partners might avoid his contract

by compelling partition. In such case, this right is suspended during the continuance of the partnership, because the waiver of that right must be regarded as part and parcel of the consideration which induced the purchase. The land is bought for a special use, and as long as the necessity for that use continues, it cannot be destroyed by the act of either tenant without the consent of his co-tenant.

A better illustration of the principle here stated could not be had than that found in the case of *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641; for here, under an agreement that "the ore-banks belonging to Cornwall Furnace shall remain together and undivided as a tenancy in common," partition was not permitted, at the instance of one of the owners, during the continuance of the conditions which entered into the consideration of the contract. It is true, the learned justice who delivered the opinion of this court said that this agreement was incorporated into the decree of the partition that had been previously made of the balance of the estate in pursuance of the contract. This, however, was a mistake; though, undoubtedly, part of the consideration for that decree, as between the parties to it, was the stipulation referred to. The commissioners, who were empowered to make partition, reported *inter alia* as follows: "And we do further report that the tract of land called Bingham's Place, at Conewaga, together with a small tract of fifty acres of land adjoining thereto, and also the ore-banks and mine-hills of Cornwall Furnace, do still remain undivided, to be held by the said Curtis Grubb, Robert Coleman, Burd Grubb, and Henry Bates Grubb, as tenants in common, according to their respective shares, and to the covenants and articles in said agreement hereinafter recited contained." It is thus apparent that the fifty-acre tract and the ore-banks were carefully excluded from the partition,—were to remain undivided and to be left subject to the recited contract,—and clearly the decree could not embrace lands so excluded, neither could it add force to the agreement under which the parties were acting. We repeat, therefore, that this case perfectly illustrates the principle stated; that is, where parties devote land to a particular use, which use enters into the consideration of the contract creating it, one of the tenants in common cannot, without the consent of his co-tenants, defeat the joint purpose by a writ of partition.

The same rule applies, and, perhaps, *a fortiori*, to charities. Here, again, a case in point is found in *Brown v. Lutheran*

Church, 23 Pa. St. 495, wherein we held that a church and burial-ground belonging to two distinct religious congregations, as tenants in common, under articles of association in which it was recited that they had resolved to erect jointly a house for the worship of God on "a lot which had been purchased by both congregations, and appropriated for that purpose," and in which it was also *inter alia* provided "that the members of both congregations shall have an equal right and interest in the church and land belonging to the same," were not within the purview of our statutes relating to partition, and therefore neither of those congregations could avail itself of that right without the assent of the other. The counsel for the appellants have endeavored to weaken the force of this case as a precedent by dwelling on the language of the learned justice deprecatory of the desecration of a grave-yard, and disturbance of the bones of the dead, and thereby assuming that had a cemetery not been involved in the contention, the result would have been different. But with this construction of the case we cannot agree, for a careful examination of the point decided will show that, excluding all immaterial *dicta*, it was held that the use, a charitable one, could not be destroyed in this manner at the instance of either party.

In view of the legal principle above stated, we have no difficulty in coming to the conclusion that the decree of the court below was correct. The property in controversy was, by the five congregations, purchased for and devoted to a charitable use, to wit, a parsonage and glebe for the common benefit of all jointly. This appears by the deed itself, wherein it is set forth: "Which several named Lutheran congregations form the Mahanoy Lutheran Ministerial Charge of said county of Northumberland." And though by that instrument the special use does not appear, it is abundantly shown by the oral evidence. Here, then, is a property vested in trustees for the use of "the ministerial charge," composed of the several churches therein named; and we may well ask, By what right does one of these churches assume to destroy that trust through the instrumentality of the writ of partition? Not, indeed, on the ground that St. Peter's church refused the services of the pastor who served the other churches, for this was its own act, and could give it no new right in the premises, but solely on the ground that St. Peter's being a tenant in common, its right to partition is necessarily incident to its title. But, as we have already shown, even admitting the

premise assumed, the conclusion is not sound, for, on all authority, this right may be waived by agreement, express or implied, of the tenants in common.

But at best, these churches, as churches, have but a qualified fee. Ordinarily, we agree that, when a deed is made to trustees for a church or other charity, the fee vests at once in the association; for, the trust being raised only for the purpose of taking and passing title, it is immediately executed in the *cestui que trust*. But it is not so when the trust is active and continuing, as where it is created for the support of a special use. In the case in hand, the deed is to trustees for the benefit of a ministerial charge, and it is clear that the fee must remain in those trustees as long as that charge continues, and it is only after the use is extinguished that the unqualified fee can vest in the *cestuis que use*, and then only in those that survive the trust. Thus it is that, from whatever point we may view the controversy in hand, it is obvious that the plaintiff's bill cannot be sustained.

Decree affirmed, and appeal dismissed, at costs of appellants.

PARTITION. — ONE TENANT IN COMMON CANNOT MAKE DIVISION of common property without the consent of the other: *Daniel v. Brown*, 34 N. H. 454; 69 Am. Dec. 505.

APPEAL OF SCRANTON ELECTRIC LIGHT AND HEAT COMPANY.

[122 PENNSYLVANIA STATE, 154.]

CORPORATION WHICH WILLFULLY FRUSTRATES OBJECT OF ITS INSTITUTION COMMITS FRAUD ON PUBLIC, and is not entitled to equitable consideration.

CORPORATION FORMED FOR PURPOSE OF FURNISHING CITY WITH ELECTRIC LIGHT, AND CLAIMING EXCLUSIVE PRIVILEGE THEREOF, IS NOT ENTITLED TO AID OF COURT OF EQUITY in restraining a rival company, after its stock has been purchased by the president of the gas and water company of the city for the purpose of destroying competition, and it is operated wholly in the interest of the latter company.

LEGISLATIVE GRANT OF EXCLUSIVE PRIVILEGES TO CORPORATION IS TO BE CONSTRUED MOST STRICTLY, and every intendment not obviously in favor of the grant must be construed against it.

EXCLUSIVE PRIVILEGES CONFERRED BY SECTION 34 OF PENNSYLVANIA ACT OF 1874 DO NOT EXTEND to companies formed thereunder for the purpose of furnishing light by electricity.

BILL in equity by the Scranton Electric Light and Heat Company, to restrain the Scranton Illuminating, Heat, and Power Company from furnishing electric light to the city of Scranton. The bill was dismissed, and the plaintiff appealed. The facts are stated in the opinion.

W. H. Jessup, for the appellant.

Robert Snodgrass, Edward N. Willard, and Everett Warren, for the appellee.

GORDON, C. J. The Scranton Electric Light and Heat Company, which, in the case in hand, seeks to restrain the defendant from furnishing electric light to the citizens of Scranton, was chartered on May 20, 1884, under the act of April 29, 1874, "for the purpose of furnishing light and heat to the city of Scranton and suburbs, and the inhabitants thereof." Soon after the organization of this company, the stock thereof was purchased by the president of the gas and water company, in order, as the counsel for the appellant alleges, that "the two companies might work in harmony, and furnish all the facilities demanded by the public for light without that ruinous competition which might prove disastrous to both." In other words, the gas company effectually anticipated and prevented a competition that might have proved highly beneficial to the community, by securing the stock of its rival.

Of course, if this were done for a legitimate purpose, and that purpose had been faithfully carried out, no serious objection could be taken to it. But unfortunately for the plaintiff's case, the master has found that neither in design nor execution was that purpose originated or carried out for the welfare of any one but the company. He finds "that from the 1st of July, 1884, until the commencement of this suit, the business of the company was managed wholly in the interest of the Scranton Gas and Water Company, not with a desire and effort on part of its management to encourage the use of electric light, and to furnish the best and cheapest light practicable, but with the intention, as far as practicable, to restrict the use of electric light for the benefit of the said gas and water company, and depending upon the supposed exclusiveness of the plaintiff's franchise for protection against competition." This finding is sustained, not only by the oral testimony, but by the results. When W. W. Scranton, the president of the gas and water company, took charge of the electric company, it

had already secured subscriptions for sixty-four arc lights, but within a year thereafter the number of those lights was reduced to fourteen, and up to the time of the establishment of the new company, that number was never increased so much as to exceed twenty. This result seems to have been occasioned by a change in the method of furnishing the electricity, which produced an increase of cost, and also by a reduction in the price of gas. This latter result being beneficial to consumers, not only could not be complained of, but *prima facie* might be regarded as the cause of the falling off of the demand for electric lights. This explanation appears, however, from subsequent events, to be fallacious; for, since the establishment of the competing company, the plaintiff has secured contracts for 230 arc lights, and the defendant has placed 100 lights of the same character, together with 4,000 incandescent lights. It is thus obvious that, by the operations of the plaintiff, the citizens of Scranton were purposely deprived of a valuable source of illumination without any corresponding benefit.

Now, the primary object of the institution of a corporation is the public welfare, and the interest of the stockholders is but secondary; hence the willful frustration of that intention by the act of a company is a fraud on the public, and the corporation perpetrating it is entitled to no equitable consideration. According to the finding of the master, of this kind of fraud the complainant has been clearly guilty; it has become the mere instrument in the hands of the gas and water company to deprive, by a false pretense, the city and citizens of Scranton of a very useful if not absolutely necessary commodity. How, then, can it stand in a court of equity? It is to no purpose to say that its charter cannot be attacked in this collateral proceeding. No one is attacking its charter, but it cannot interpose that charter as a cover for its own fraud. It has appealed to the equitable side of the court to suppress, for its own benefit, a competition that has arisen from its neglect of a charter duty; and without touching upon its legal rights or legal remedies, this, we think, cannot be done. Chancery deals only with conscionable demands, and with those that are unconscionable, whether through fraud or mere neglect, it will have nothing to do. Therefore, without further comment, we might affirm the decree of the common pleas, but as there is another important question involved in the case, we cannot properly pass it without comment.

Under the third clause of the thirty-fourth section of the act of 1874, the plaintiff claims the exclusive right to furnish the city of Scranton and its inhabitants with electric lights. This claim may be regarded as sound, if, in fact, the said section does include electric lighting, but not otherwise. Did the legislature intend to embrace electric lighting in the language, "companies incorporated under the provisions of this statute for the supply of water to the public, or for the manufacture of gas, or the supply of light or heat to the public by any other means"? Before answering this question we must call attention to what has heretofore been regarded as an unalterable rule; that is, that a legislative grant to a corporation of exclusive privileges is, as said by Mr. Justice Green, in *Emerson v. Commonwealth*, 108 Pa. St. 111, to be construed most strictly; and we may add, that every intendment not obviously in favor of the grant must be construed against it. Monopolies are favorites neither with courts nor people. They operate in restraint of competition, and are hence, as a rule, detrimental to the public welfare; nor are they at all allowable except where the resultant advantage is in favor of the public, as, for instance, where a water or gas company could not exist except as a monopoly. Applying, then, the rule here stated to the case in hand, and we cannot pronounce the conclusion of the master and court below to be erroneous.

In the case above cited, the sharpest technicality of construction was adopted in order to defeat the extravagant demand of the corporation claiming the exclusive privilege to furnish the city of Pittsburgh with natural gas for the purposes of fuel. But in the case before us, it is apparent that the legislature did not, in the making of the act of 1874, intend to embrace lighting by electricity. It is true that the language of this statute seems, at first sight, to be broad enough to embrace all methods of lighting and heating then known, or that might thereafter become known; yet, we suppose, it will not be contended that the intention was to grant to this company the exclusive privilege of furnishing to the citizens of Scranton coal, wood, oil, and other well-known and ordinary materials for lighting and heating. Not, indeed, that the law-makers could not have conferred such power, but because it is not probable that they intended to confer a power so unreasonable. It is therefore obvious that we must consult, not only the letter of the act, but also the intention of its makers. If, however, it were designed to embrace a method

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of lighting by electricity,—a method not then in use for economic purposes,—it is remarkable that the means necessary for its proper distribution were not provided for. Under the thirty-fourth section of the act,—the only one upon which the plaintiff relies for its exclusive right,—there is no power conferred to enter upon the public streets for the erection of poles and placing of wires, the privilege of so entering being confined to the laying of pipes only. From this it is clear that the legislature had in mind, not a then unknown process of public lighting and heating, but a process involving the use of gas, or some similar material, for the distribution of which pipes only were necessary. Having thus ascertained the intention of the law-making power at the time of the passage of the act of 1874, we cannot agree to extend the franchise of the plaintiff by construction, but are willing rather to concur in the decree of the court below, because the right so claimed not only may be, but has proved to be, detrimental to the public welfare.

The decree of the court below is now affirmed, at costs of appellant.

CORPORATIONS. — Charters are construed favorably for the public, and against corporation: *Commonwealth v. Erie etc. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471; but charters must be construed reasonably: *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; 84 Am. Dec. 527.

APPEAL OF WALSH.

[122 PENNSYLVANIA STATE, 177.]

GIFT. — IN EVERY VALID GIFT A PRESENT TITLE MUST VEST IN THE DONEE, irrevocable in case of a gift *inter vivos*, revocable only upon the recovery of the donor in case of a gift *causa mortis*.

ID. — If anything remains for donor to do before title of donee is complete, in either gifts *inter vivos* or *causa mortis*, the donor may decline further performance, and resume his own.

ID. — Court of equity will not compel donor's personal representatives to complete imperfect gift by the doing of an act which the donor, if living, might have refused to do.

ID. — **DONATIO CAUSA MORTIS** — **SAVINGS BANK BOOK.** — The delivery of a savings bank book to a third person by a depositor, in expectation of death, saying, "The money there is for my sister in Ireland; but if I don't die, I want it back," does not constitute a valid *donatio causa mortis*.

APPEAL by the administratrix of the estate of Margaret Tyrrell from a decree of the orphans' court, awarding a balance

on deposit in the Philadelphia Saving Fund Society to Catharine Tyrrell, as a *donatio causa mortis*. The facts are stated in the opinion.

H. La Barre Jayne, Arthur Biddle, and George W. Biddle, for the appellant.

Dwight M. Lowrey, Henry W. Hall, James M. Beck, and William F. Harrity, for the appellee.

WILLIAMS, J. A gift is more than a purpose to give, however clear and well settled the purpose may be. It is a purpose executed. It may be defined as the voluntary transfer of a chattel completed by the delivery of possession. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and therefore irrevocable contract. All gifts are necessarily *inter vivos*, for a living donor and donee are indispensable to a valid donation; but when the gift is prompted by the belief of the donor that his death is impending, and is made as a provision for the donee, if death ensues, it is distinguished from the ordinary gift *inter vivos* and called *donatio mortis causa*. But by whatever name called, the elements necessary to a complete gift are not changed. There must be a purpose to give; this purpose must be expressed in words or signs; and it must be executed by the actual delivery of the thing given to the donee or some one for his use. In every valid gift a present title must vest in the donee, irrevocable in the ordinary case of a gift *inter vivos*, revocable only upon the recovery of the donor in gifts *mortis causa*: *Wells v. Tucker*, 3 Binn. 366; *Nicholas v. Adams*, 2 Whart. 17; 6 Bac. Abr. 162. The thing given must be susceptible of delivery. In the case of money on deposit or loaned out, the certificate of deposit, or the bill, note, or bond may be delivered properly indorsed, and it will confer on the donee an absolute title to the fund represented by it. But if there remains something for the donor to do before the title of his donee is complete, the donor may decline the further performance and resume his own. This is true of both classes of gifts, and there can be no good reason for distinguishing between them in this particular: *Scott v. Lauman*, 104 Pa. St. 593. As to gifts *inter vivos*, it was distinctly held in *Bond v. Bunting*, 78 Id. 210, that an assignment or some equivalent instrument was necessary in order to pass title to a chose in action. The reason is, that a gift is incomplete which does not clothe the donee with the rights and powers of ownership, and these rights

and powers do not vest without a complete delivery: *Michener v. Dale*, 23 Id. 59; *Fross's Appeal*, 105 Id. 258.

In the case of *Basket v. Hassell*, 107 U. S. 602, a certificate of deposit was indorsed, "Pay Martin Basket, no one else, then not till my death," and so indorsed it was delivered to the donee; but it was held that no valid *donatio mortis causa* was shown because a delivery of the certificate with the indorsement did not clothe the donee with the rights and powers of an owner. The certificate was put into the hands of the donee, but he was unable to make use of it because of the limitation of the assignment. So in *Mitchell v. Smith*, 4 De Gex J. & S. 422, the indorsement upon the certificate was, "Pay the within contents to Simon Smith, or his order, at my death," and delivery of the indorsed certificate was made; but the gift was held to be incomplete because no present control over the fund passed to the donee. If the certificate had been payable to bearer, mere delivery would have been enough to pass the title; and it has been held that, in the case of notes and other instruments payable to order, a delivery, accompanied by words importing a present, absolute gift, would invest the donee with the ownership of the fund. The reason for this holding seems to be that the certificate, bill, or note is the legal evidence of the deposit or debt, and that when the owner parts with the instrument by gift or sale, he parts, at least *prima facie*, with the debt or deposit. The production of the instrument or proof of its destruction or loss is indispensable to a recovery of the demand it represents, and the owner, by his gift of the note, parts with his own power over the debt of which it is the evidence.

In the case at bar, Margaret Tyrrell was a depositor in the Philadelphia Saving Fund. Her deposits were held by the bank under the rules of the law merchant and the regulations peculiar to this institution. During her last sickness, she handed her bank-book to Thomas Doyle, saying: "The money there is for my sister in Ireland; but if I don't die, I want it back." Our question is, whether this passed the title to the fund in the hands of the bank as a *donatio mortis causa*. This depends, to some extent, upon the character of a depositor's bank-book.

Where a deposit is made in bank, the depositor is credited upon the books of the bank with the amount deposited, and a duplicate entry of credit is made upon the bank-book in his hands. He thus has at all times a statement of his credits

in his account with the bank. His debits he may keep in any convenient manner, or, if the rules of the bank require it, he may present his book with each check, that the debits may be entered by the officers of the bank. The book is, at most, a statement of an account, showing how much has been deposited by the customer to be held by the bank upon the terms which the law or the agreement between the parties has provided. When withdrawn, it is by means of checks, orders, or such other form of voucher as the terms of the deposit or the usages of the institution may provide for. The mere possession of the book by the bank would afford no evidence of the payment of the money to the depositor. An assignment of such a book, like an assignment of a book of original entries, will operate to transfer the entire balance remaining due upon the account; but a delivery of it will no more transfer the fund than will a delivery of a book of original entries transfer the balances due upon the several accounts contained therein. This is substantially decided in *People's Savings Bank v. Cupps*, 91 Pa. St. 315. Mrs. Cupps placed her bank-book in the hands of her son. He presented it at the bank, together with a forged check in his own favor, and the fund was paid to him. Mrs. Cupps brought suit to recover the amount of her deposits, and the bank set up the possession of the book by the son, and its production by him, when the check was presented, as a defense. This defense, however, did not avail, and the plaintiff was permitted to recover from the bank.

When Margaret Tyrrell handed her book to Mr. Doyle, saying, "The money there is for my sister," she did not invest her sister, or Doyle as her representative, with any control over the fund. The ownership did not pass out of her. There was no delivery of a check, order, assignment, or other instrument which would have served as a voucher if the money had been paid by the bank, or by means of which the money could have been properly demanded.

As a gift *inter vivos* it was not good, for the control of the donor over the fund continued. In *Duffield v. Elwes*, 1 Bligh, N. S., 527, a distinction was taken between gifts *inter vivos* and those made *causa mortis*, to which our attention has been drawn. It was there said: "I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do, but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that

donor." If this is to be understood, as is urged in the argument, that the personal representatives of a decedent may be compelled to complete a gift which was left incomplete by the alleged donor, we cannot assent to the doctrine; nor do we quite understand what is meant by the passage from the opinion cited. If the gift was "a good *donatio causa mortis*," then nothing remained to be done by the donor that was essential to the vesting of title in his donee; and the converse of the proposition is equally clear, that if anything remained to be done by the donor which was essential to complete his donee's title, it was not a good *donatio*, but an unexecuted, possibly an abandoned, purpose to give. If, therefore, the case presented was that of a good *donatio*, the only questions that could be raised between the donee and the personal representatives of the donor would be those relating to matters of form, affecting not the title of the donee, but the use of appropriate remedies against third persons for the recovery of the gift. If it was not a good *donatio*, the courts would have no jurisdiction. The estates of those who can no longer speak for themselves stand in much greater need of protection than living property-owners, and it is not possible that a chancellor would compel an executor or administrator to complete a gift by the doing of any act which the alleged donor, if living, might have refused to do, and thereby revoked his purpose to give. In the case of a book of original entries,—a bank-book,—an executory contract, and the like, where the possession of the document affords no presumption of ownership, something more is necessary than the manual delivery of the book or paper in order to make a valid gift. The title must pass out of the donor in his lifetime, or it can never reach the donee.

Judgment reversed.

GIFTS. — ESSENTIALS OF VALID GIFT *inter vivos* or *causa mortis*: *Henschel v. Maurer*, 69 Wis. 576; 2 Am. St. Rep. 757, and note 759. See also note to *Alger v. North End etc.*, 146 Mass. 418; 4 Am. St. Rep. 334; *Thweat v. McCullough*, 84 Ala. 517; 5 Am. St. Rep. 391, and note 393. To constitute valid gift *causa mortis*, it is not only essential that delivery be complete, but possession must also be retained by donee till after donor's death: *Dunbar v. Dunbar*, 80 Me. 152; 6 Am. St. Rep. 166, and note 169. General doctrine of gifts: *Love v. Francis*, 63 Mich. 181; 6 Am. St. Rep. 290, and note 300, 301. Where one in *extremis* takes a package of bonds from beneath his pillow and hands it to donee, saying, "These bonds are for you," an intention to give is sufficiently manifested to constitute a valid gift *causa mortis*: *Vandor v. Roach etc.*, 73 Cal. 614. Delivery of personalty by donor in *extremis*, upon

condition that it shall belong to donee if donor dies without revoking it, is valid gift *causa mortis*: *Henschel v. Maurer*, 69 Wis. 576; 2 Am. St. Rep. 757. Before gift *causa mortis* can take effect, the donor must part, not only with the possession, but also with all present control and dominion over the subject of the gift: *Daniel v. Smith*, 75 Cal. 548. To constitute a valid gift of choses in action, delivery must be such as to vest in donee a present control absolutely and irrevocably: *Sterling v. Wilkinson*, 83 Va. 791. Where a father set apart certain United States bonds as a gift to his daughter, but never delivered them to her, but remained in father's possession at her request and his assent for safe-keeping, etc., the transaction did not constitute a valid gift *inter vivos*: *Flanders v. Blandy*, 45 Ohio St. 108. An unqualified gift of the income of land is to be taken as a gift of the land itself, but otherwise where gift of the income is qualified: *Appeal of Kline*, 117 Pa. St. 139. To constitute a valid gift of personalty, there must be actual delivery of the property, or some act equivalent to such delivery: *Peters v. Fort M. Co.*, 72 Iowa, 405. There was no valid gift where son occupied part of father's realty for twenty years prior to father's death, and subsequently claimed title under verbal agreement that he was to occupy and cultivate land during father's lifetime and pay certain rent, and afterwards to be sole owner of such realty: *Wertz v. Merrill Brothers*, 74 Iowa, 683. Where father gave his daughter residing with him, and who continued so to reside as long as he lived, a colt, of which she had possession only at their residence, and which, eight years afterwards, she exchanged for a mare which she kept on father's farm as long as he lived, such mare is daughter's own personal property: *Lowther v. Lowther*, 30 W. Va. 103.

FULMER v. WILLIAMS.

[122 PENNSYLVANIA STATE, 191.]

NAVIGABILITY, TEST OF. — Navigability in fact, and not the ebb and flow of the tide, is made the test, in Pennsylvania, by which the character of a stream, as public or private, is determined; and the great but tideless rivers of the state are therefore navigable rivers, belonging to the state, and held for the use of all her citizens.

GRANT OF LAND BOUNDED UPON STREAM, EXTENT OF. — Grant of land bounded upon a non-navigable stream extends *usque ad filum medium aquæ*; but a grant of land bounded upon a navigable river extends to ordinary low-water mark.

GRANT OF LAND BOUNDED UPON NAVIGABLE STREAM — SERVITUDE OF PUBLIC. — Grantee of land bounded upon navigable stream takes, between high and low water mark, subject to the rights of the public; and as between him and the public, may use his land below the line of high water for such purposes only as do not interfere with the free flow and navigation of the water.

RIPARIAN RIGHTS IN NAVIGABLE STREAM. — Neighboring riparian owners upon navigable stream are bound to observe the obligations that grow out of their ownership of the soil above low-water mark and their proximity to one another; and one has no more right to injure another with the waters thereof than with the waters of a non-navigable stream.

OWNERSHIP IN WATER. — Riparian owner upon navigable stream has no ownership in the water, either above or below low-water mark, and has

therefore, as between himself and the commonwealth, no greater right in it than any other citizen.

ERUCTION OF DAM—RIGHT TO WATER-POWER. — Riparian owner upon navigable stream has no right to erect a dam to turn the water to his mill without a grant from the commonwealth; and if he does so, he is a trespasser, and acquires no title to the water-power resulting therefrom.

DIVERSION OF WATER—ACTION FOR DAMAGES. — One riparian owner upon navigable stream cannot maintain an action for loss of water-power caused by the diversion of the stream by another owner, he having no title to the water, and no legal right to the power; but he may recover if, in consequence of such diversion, he has been deprived of convenient access to and use of the stream for those purposes to which he is entitled as a riparian owner.

CASE by David Williams against Henry Fulmer, to recover damages for the diversion of the waters of the Lehigh River. The plaintiff had a verdict and judgment, and the defendant brought error. The opinion states the facts.

Edward Harvey, for the plaintiff in error.

R. E. Wright, D. D. Roper, and J. Marshall Wright, for the defendant in error.

WILLIAMS, J. The plaintiff below is the owner of land lying on the west bank of the Lehigh River, on which he has a factory for the making of school-slates. The machinery has for several years been propelled by the water of the river. Directly opposite the plaintiff's factory is an island, between which and the west bank of the river flowed a stream which, in ordinary stages of water, was about eighty feet wide, and from four to five feet deep. Across this channel the plaintiff had built a dam high enough to raise the water about one foot above its ordinary level, and this furnished his water-power. The main stream of the river passed along the east side of the island. The defendant below — Fulmer — owned land on the bank of the river adjoining and next above the land of the plaintiff. He operated a slate-quarry, and the plaintiff alleged, and the jury has found, that he has filled the stream, from his own land opposite the head of the island, many feet beyond low-water mark, with the *débris* from his quarry, until he has in effect diverted the water of the river from the plaintiff's land, and destroyed his water-power, the water now passing on the east side of the island. The evidence shows quite clearly that the filling up of the channel below low-water mark was done with a deliberate and freely expressed purpose to depreciate the value of the plaintiff's property, and to destroy his water-power.

The Lehigh River is a navigable stream, a public highway. The plaintiff had no grant from the state or its grantee, the Lehigh Navigation Company, of the use of the water for any purpose. The defense set up the public character of the river, and denied that the plaintiff had a title to the water-power as riparian owner or otherwise. The court instructed the jury that the plaintiff had no title below low-water mark, but that between low and high water marks he was the owner of the soil, and, subject to the right to navigate the stream by the public, he had a right to use the water; and that he could recover for the destruction of the power so far as it grew out of the water flowing above low-water mark. The assignments of error are seventeen in number, but the case presents two principal questions: 1. What are the rights of a riparian owner, on the shore of a navigable stream, between high and low water marks? 2. What are the rights of such owner in the water flowing over this strip of shore? Both questions require to be considered,—1. As between the riparian owner and the public; 2. As between him and other riparian owners.

In the British Islands, the rivers are inconsiderable in volume and of little value for purposes of navigation except where they are affected by the ebb and flow of the tide. From this it resulted naturally that royal or public streams, the bed of which belonged to the crown, came to be distinguished from private streams, the beds of which belonged to the owners of the banks, by reference to the presence or absence of tide-water. On this continent, the early settlers found large rivers with navigable tributaries, forming vast systems of internal communication, extending hundreds, and in some instances thousands, of miles above the reach of tide-water. The common-law definition of a navigable river was unsuited to this state of things, and seems never to have been adopted in Pennsylvania; on the contrary, navigability in fact was made the test by which the character of a stream, as public or private, was determined, and the great but tideless rivers of the state were held to be navigable rivers, public highways, belonging to the state, and held for the use of all her citizens. The beds of such rivers, between the lines of ordinary low water, on their opposite sides, have not been granted out by the commonwealth to individuals, but continue to be held and controlled by and for the public: *Carson v. Blazer*, 2 Binn. 475; 4 Am. Dec. 463; *Flanagan v. City of Philadelphia*, 42 Pa. St. 219.

A grant of land bounded upon a stream not navigable extends *usque ad filum medium aquæ*; but a grant of land bounded upon a navigable river extends to ordinary low-water mark only. Between this line and high-water mark, the land of the grantee is, by the nature and necessities of the situation, subject to a servitude in favor of the public. The stream must run within its natural banks after as well as before the grant. The grantee takes subject to the rights of the public in and upon the highway, and as between him and the public, he may use his land below the line of high water for such purposes only as do not interfere with the free flow and navigation of the water that flows over it. As to neighboring riparian owners, the manner in which he may use the shore becomes a question of private right. While, as citizens, they are all entitled to the unobstructed use of the highway, as individual owners of land along the stream, they are clothed with the rights and are subject to the duties that grow out of their ownership and their neighborhood. The maxim, *Sic utere tuo ut alienum non lædas*, is as clearly applicable to their water fronts as to their back lands. If a riparian owner places a structure upon his own land between high and low water marks that impedes navigation, he infringes the public right, and subjects himself to liability therefor. His ownership of the land over which the water flows along the shore will not relieve him from the consequences of his act, for his title to the shore is subject to the right of the public in the stream. If he places the structure in such manner as to throw the current against his neighbor's shore at such an angle as to wear it away and undermine and wash out his land, he inflicts a private injury upon his neighbor, for which a right to compensation exists. In the case of a private stream, no one would doubt the right of an injured owner to maintain an action for the damages suffered by him by reason of a change in the current. But one has no more right to injure another with the water of a navigable stream than with that of a non-navigable, private stream. It is not the character of the stream, but the character and consequences of the act of the owner of the shore that determines the right of the injured party to compensation. As between themselves, riparian owners are owners of the soil, and are bound to observe the obligations that grow out of their ownership and their proximity. In *Zug v. Commonwealth*, 70 Pa. St. 138, it was held that an owner of the soil might use the river-bed between high and low water

marks for his own private purposes, if he did not interfere with the rights of the public. This declaration is, however, to be understood as qualified by the rule we have just considered, that he must not, in the exercise of his right as a riparian owner, inflict injury upon his neighbors. This rule sets limits to the manner in which property of every description may be used, and is unaffected by the accident of location.

We come now to our second question, viz.: What rights has a riparian owner in the water of a navigable river flowing between high and low water marks? The water of a stream is not the subject of ownership in the ordinary sense of that word. If one is the owner of the land over which a stream flows, he is entitled to the use of the water because of his ownership of the bed in which it flows. He may not retain the water upon his land indefinitely, or divert it from its natural channel, or sell it to be removed; but, subject to the reasonable use of the water by him, lower owners have a right to the stream, and he must deliver it to them. In the case of all navigable rivers, the beds in which they flow belong to the public. The right to the use of water follows the ownership of the bed in which it flows. The commonwealth is therefore the owner of the rivers, and holds them for the use of its citizens. They are public property,—natural highways,—open to all who may have occasion to use them: *Carson v. Blazer, supra*; *Poor v. McClure*, 77 Pa. St. 214. When the volume of the stream swells in time of high water, its surface remains the surface of the highway, and the riparian owner must do nothing that shall interfere with the use of the highway or any part of it by the public up to the line of high water. The fact that the water of the highway flows over his land, when it rises above low-water mark, gives him no title to it, for he holds his shore subject to this servitude in favor of the public. The stream is not divisible by the lines of riparian owners, or susceptible of divided and hostile ownership, but is the same public highway in all stages of water, and belongs in all its breadth and depth to the public. The owner of the shore having no ownership in the water, has, as between him and the commonwealth, no greater right in it than any other citizen. He has no right to erect a dam to turn the water to his mill without a grant from the commonwealth of the right so to do, and if he erects such dam without a grant, he is a trespasser, and acquires no title to the water-power resulting therefrom. He stands in the same position as an intruder

upon a public road, without right, and liable to removal at any moment. He has an indisputable right as a citizen to the use of the river as a public highway, but as a riparian owner he has no right to obstruct its flow, or to divert its waters except for domestic purposes, and, within certain limits, for purposes of irrigation. If he does erect a dam, and turn the water to his mill, he, ordinarily, infringes the public right only. For such infringement he is liable to the public, and his dam may be abated as a nuisance. But such use of the water is not necessarily an injury to other riparian owners as such, especially to those who, like the defendant in the court below, are farther up the stream. If the navigation is unobstructed, it is not easy to see what reason the owners living up the stream have for objecting to the use of the water as a power. The state, as the owner of the river, may object, and between her and the mill-owner the question is one of property as well as one of interference with the right of navigation. The mill-owner must buy the power if he would use it safely. Without such grant he is a trespasser upon the property of the public, and an obstructor of the public way. But to justify an objection by a neighboring riparian owner as such, he must be able to show that he has suffered a private injury from the acts of the mill-owner.

Applying these principles to the case now before us, it is clear that the plaintiff was allowed to recover for what did not belong to him. He had no title to the water, whether above or below low-water mark, and he could have no legal right to the power resulting from the erection of his dam. Its destruction was therefore *damnum absque injuria*. The fact that he was intending to acquire a title to the water-power from the grantees of the commonwealth is quite immaterial. He had not in fact done so, and he had no better title to this water-power than he had to any other property of the navigation company. The action was brought to recover for the loss of a power to which he could show no title, because he had none. It was not the case of an undershot wheel moved by the current in time of high water, but of a mill or factory provided with power by an unauthorized and illegal obstruction of the natural current, which could have been removed at any moment by the public authorities, or by the grantees of the commonwealth.

But while the plaintiff in the court below may not recover damages for the loss of the water-power which was not his, we

do not think he is without a remedy for such injury as he has actually suffered. Upon suitable averments, he may recover for the damages he has sustained, as a riparian owner, from the illegal acts of his neighbor. The evidence shows that Fulmer has obstructed the stream far beyond low-water mark, and practically closed the channel between the island and the west shore. This deprives Williams of convenient access to and use of the current for many legitimate purposes. This has not been done under the authority of the commonwealth or by an exercise of the right of eminent domain, but in obvious disregard of the rights of the public, as well as those of his neighbor. It appears by the evidence to have been done for the purpose of compelling his neighbor to resort to steam-power for his factory, and to deprive him of the use of the water. Such invasion of the bed of the stream was an unlawful act, and if, in consequence of it, Williams was deprived of convenient access to the river, for purposes of navigation, for fishing, for domestic or other proper purposes, he is entitled to recover damages for the injury sustained. It is not as a mill-owner, but as a land-owner, that he has suffered by being deprived of the conveniences which resulted from his riparian ownership, and which, as between him and his neighbor, were his own.

If the unlawful act from which he suffers was done with malice, proof of the malice is competent upon the question of damages.

What Fulmer said in reference to the filling of the stream, its effect upon Williams, and his own motives or purposes, is competent for the purpose of showing malice, and was properly received on the trial. As the case stood, however, in the court below, the *narr.* set out the loss of the water-power, and that only, as the cause of action, and for that the plaintiff was not entitled to recover.

Judgment reversed, and *venire facias de novo* awarded.

NAVIGABLE WATERS — RIGHTS OF PUBLIC BETWEEN HIGH AND LOW WATER MARK: Note to *Brown v. De Graff*, 50 N. J. L. 409; 7 Am. St. Rep. 798.

RIGHTS OF RIPARIAN PROPRIETOR in navigable and in non-navigable waters: *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48, and note 53.

NAVIGABLE WATERS. — ALL STREAMS BELOW TIDE-WATER are *prima facie* public, and all above tide-water are *prima facie* private: *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439. At common law, rivers were not navigable, except those in which the tide ebbed and flowed: *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Monon-*

gabala Bridge Co. v. Kirk, 46 Pa. St. 112; 84 Am. Dec. 527; but such rule does not prevail in Pennsylvania: *Stover v. Jack*, 60 Pa. St. 339; 100 Am. Dec. 566. Stream is not navigable which is not capable of being used for the passage of boats, except when swelled by freshets: *Morgan v. King*, 35 N. Y. 453; 91 Am. Dec. 58. Ohio River, though not a navigable river in strict common-law sense, is a public highway for navigation purposes: *Baker v. Lewis*, 33 Pa. St. 301; 75 Am. Dec. 798. Rivers, lakes, etc., are not strictly public waters, yet if they are navigable in fact, the public have right to their use: *State v. Narrows Island Club*, 100 N. C. 477; 6 Am. St. Rep. 618.

WHAT RIGHTS CONVEYED UNDER DEED OF TRACT ADJACENT TO RIVER. — Where the owners of a tract of land extending three quarters of a mile along a river bank, with a fall of fourteen feet within its limits, sold a small outside lot lying next to it, with right to carry the water from the river through the riparian tract to a mill on the lot conveyed, and to return same to river through riparian tract, the deed conveyed a right to the entire fall of the river between the upper and lower lines of the riparian tract: *Brigham v. Ross*, 55 Conn. 373.

HERSTER v. HERSTER.

[122 PENNSYLVANIA STATE, 239.]

WILL — UNDUE INFLUENCE. — Undue influence exists wherever, through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment. To affect a will, it must, in a measure at least, destroy free agency, and operate on the mind of the testator at the time of making the will.

WILL — UNDUE INFLUENCE. — Testator's strength and condition of mind may become a proper, indeed an essential, subject of inquiry, in passing upon a question of undue influence, since a person of feeble intellect is much more easily influenced by undue means than one of vigorous mind.

TESTATOR'S DECLARATIONS. — Declarations of the testator are admissible to establish the state and condition of his mind, in an issue raised upon the exercise of fraud and undue influence in the procurement of the will, if reasonably connected in point of time with the testamentary act; although such declarations cannot have any force in establishing the substantive fact of undue influence, and in the absence of evidence of other facts and circumstances showing undue influence should be excluded or wholly disregarded on that question, unless, perhaps, they were made at the very time of the execution of the will, and form a part of the *res gestæ*.

TESTATOR'S WEAKNESS OF MIND, AND CONSEQUENT SUSCEPTIBILITY to influence, must be shown to exist at the very time of the testamentary act, in an issue upon the question of undue influence; but declarations made before and after the execution of the will have some significance in showing, inferentially, the mental condition at that time.

LIMITATIONS AS TO TIME WHICH GOVERN THE ADMISSION OF TESTATOR'S DECLARATIONS, in an issue upon the question of undue influence, must depend largely on the character of the unsoundness attempted to be proved.

WILL — UNDUE INFLUENCE — UNEQUAL DISPOSITION OF PROPERTY. — It is only when a will is grossly unreasonable in its provisions, and plainly inconsistent with the testator's duty to his family, that, in case of doubt, the inequality can have any effect on the question of undue influence.

WILL — UNDUE INFLUENCE — SUBMISSION OF EVIDENCE TO JURY. — In an issue *devisavit vel non*, the question of mental unsoundness, or of undue influence, ought not to be submitted to the jury, where the evidence is of such unsatisfactory character that the court would not sustain a verdict upon it; and such submission is good ground for reversal.

ISSUE *devisavit vel non*, framed in the court of common pleas of Northampton County, to test the validity of the will and codicils of Andrew Herster. The contestants were William Henry Herster and Eliza Reich, and the proponents were Andrew Jackson Herster and James W. Lynn, the executors of the will, and the former, also, the principal devisee. The jury found in favor of the contestants, and, judgment having been entered, the defendants brought error. The facts sufficiently appear in the opinion.

O. H. Meyers, Henry W. Scott, and William Mutchler, for the plaintiffs in error.

Edward J. Fox, W. S. Kirkpatrick, B. F. Fackenthall, and Frank Reeder, for the defendants in error.

CLARK, J. This issue *devisavit vel non* was framed in the court of common pleas of Northampton County to test the validity of the last will and testament of Andrew Herster, deceased, and of the several codicils thereto. The will was made and executed June 13, 1874; the first codicil, August 29, 1878, and the second, May 7, 1880. Andrew Herster died May 27, 1882, at the age of eighty-four years, possessed of an estate estimated at two hundred thousand dollars, leaving to survive him six children, viz.: Daniel Herster, Jacob Herster, Susan Keiper, Eliza Reich, Andrew J. Herster, and William Henry Herster. Of these, Andrew J. Herster is the principal devisee and proponent of the will, and William Henry Herster and Eliza Reich are the contestants. The only matter in issue, under the pleadings, is whether or not the will and the codicils, or any of them, were procured by fraud or undue influence; the contestants, who were plaintiffs below, maintaining the affirmative and the proponents the negative of that issue. That Andrew Herster was, at the time of making the will and codicils, of sound and disposing mind and memory, is therein

assumed; no question can be made as to this; the only proper matter for consideration being whether that mind and memory were, in these testamentary acts or in any of them, led captive by the artifice and undue influence of Andrew J. Herster, or of any other person in his interest, so that the written papers do not express the testator's true purpose in the disposition of his estate.

Undue influence is very nearly allied to fraud, yet they are not identical; whilst undue influence comprehends fraud, fraud does not embrace every species of undue influence: Redfield on Wills, 500, note. It is only necessary, therefore, to consider the case upon the more comprehensive question of undue influence, for this will embrace all sorts artifice, imposition, or bad faith which characterize acts of fraud. Undue influence exists wherever, through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment. To affect a will, it must, in a measure at least, destroy free agency, and operate on the mind of the testator at the time of making the will. The rule is well and forcibly stated by our brother Gordon, in *Tawney v. Long*, 76 Pa. St. 115, as follows: "Undue influence of that kind which will affect the provisions of a testament must be such as subjugates the mind of the testator to the will of the person operating upon it; and in order to establish this, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy free agency in the testator; and these influences must be proved to have operated as a present constraint at the very time of making the will." It may, in the language of the learned judge of the court below, be exercised by means of misrepresentation and falsehood, directed against the persons who would be the natural objects of the testator's bounty, if the misrepresentation and falsehood so poisoned the mind of the testator as to destroy his free agency.

It is a matter of common knowledge that a person of feeble intellect is much more easily influenced by undue means than is one of a vigorous mind; therefore, in passing upon a question of undue influence, the strength and condition of the mind may become a proper, indeed an essential, subject of inquiry; for although weakness, whether arising from age, infirmity, or other cause, may not be sufficient to create testa-

mentary incapacity, it may nevertheless form favorable conditions for the exercise of undue influence.

It is contended on part of the contestants that although Andrew Herster must be presumed to have had testamentary capacity at the time of the making of this will and the codicils thereto, and that cannot be questioned in this issue, yet both his mind and body had in fact been greatly impaired by the infirmity of age and by disease; that he was seventy-six years of age when he made his will, eighty when he made the first codicil, and eighty-two when he made the second codicil, and that he was aged eighty-four years when he died; that for twenty-five years he had suffered from a progressive general paresis, or softening of the brain; that he had an apoplectic seizure a short time before the execution of the will, and that his memory was much impaired and his mind generally enfeebled; in other words, that although the testator's mind was not enfeebled to the extent of testamentary incapacity, yet it was so weakened by disease and old age as to make the testator an easy prey to the artifice of his son, and that Jackson took advantage of his father's weak condition to procure the will to be made in his favor. The proponents of the will, on the other hand, contend that the testator was of a strong, robust, and resolute mind; that, although advanced in years and afflicted to some extent with the disease stated, he conducted business successfully and extensively, throughout the whole period of his affliction, and until within two weeks of his decease; that he was engaged extensively and profitably in the purchase and sale of cattle; that he kept his own accounts, made his own calculations, and drew his own checks in payment, until the month in which he died; that within a year prior to his death he paid to three of the witnesses alone, for cattle, over twenty-six thousand dollars, and within four months and one half before his death, had paid out with his own checks, to different persons, for cattle, over eleven thousand dollars; that it was the result obtained in his various business transactions, after the making of his will, which made further testamentary provision necessary; that Jackson, his son, had been a good boy, had remained at home with his parent, and had rendered him valuable and important services; that the old man had a high opinion of his son's business capacity, and on that account often deferred to his judgment in business matters, and that the provisions in his will and the codicils in his favor were a free and voluntary act of his

father, prompted perhaps by his affectionate regard for his son, and a consideration of his personal services and worth.

It will be seen, therefore, that undue influence is the substantial fact affirmed on one side, and denied on the other; imbecility or weakness of mind being a collateral or extraneous question arising out of the proofs.

The declarations of the testator, made within a reasonable time before and after the execution of the will, have always been received in evidence upon a question of testamentary capacity, to show the state and condition of the testator's mind, and if reasonably connected in point of time with the testamentary act, we cannot see any reason why they would not be admissible to establish the same fact in an issue raised upon the exercise of fraud and undue influence in the procurement of it. Such declarations cannot have any force, however, in establishing the substantive fact of undue influence. "It is certain such testimony is not admissible for the purpose of proving any distinct fact depending upon the force of the admission, since the testator is not a party to the question of the validity or interpretation of his will": *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254; 20 Am. Dec. 100; Redfield on Wills, 539. "The object of this testimony is to show such a state of weakness or vacillation of mind as rendered the testator an easy victim either of artifice, force, or fraud. Such declarations afford most satisfactory evidence, not only of the strength of mind, but often exhibit those peculiar phases of the mind and of the affections which especially expose the testator to be overcome by the terror of threats or the seductions of flattery. And although these declarations will necessarily afford some ground for judging in regard to the effect of any attempts at undue influence, that element in the testimony not being legitimate, it can only be eliminated by the judge in summing up to the jury": *Id.* 548. "It is apparent that the declarations of the testator that he did not execute his will freely, that he never intended to have made such a will, and never should but for the influence of those persons in whose favor it is made, and similar declarations, which are very common in the testimony elicited in testamentary causes, can be of no force whatever as testimony tending to establish the truth of the declarations. In that light, such declarations are mere hearsay, depending for their force upon our confidence in the veracity of the person making them, and in most cases easily

explained, without regard to the question of their truth, and have always been rejected as evidence: *Id.* 530.

Testamentary capacity being the normal condition of a person of full age, it follows that, in the absence of evidence of undue influence, proof of the testator's declarations should be excluded or wholly disregarded on that question. Therefore, in *Moritz v. Brough*, 16 Serg. & R. 403, it was held that to set aside a will duly executed by a man of competent understanding, evidence is not admissible of declarations made by him that he intended differently and was importuned by his wife; or of the wife's high temper and importunities with the testator in relation to his will. So in *Hoshauer v. Hoshauer*, 26 Pa. St. 404, the testator's mental capacity was not disputed. The will was made in 1853. To show undue influence, the contestants offered to prove that in 1855 the testator said he had "made a will"; that he had "made it as John wanted it"; that he had "to make it as John wanted it"; and that he "knew it was wrong." The offer was rejected, and upon error it was held that it was rightly rejected. Mr. Justice Lowrie, delivering the opinion of the court, said: "This could not prove fraud in procuring it, though nearly all the estate was given to John's children, himself getting a dollar. An instrument that for two years remained subject to change or cancellation at the maker's pleasure cannot be set aside on such a declaration. A man who is competent to make a will can so easily correct any of its provisions, however obtained, that it is hard to imagine any kind of declarations of his that would prove it to be fraudulent, when any considerable time has intervened between its execution and his death." So, also, in *McTaggart v. Thompson*, 14 Pa. St. 149, where the validity of a will was questioned both for want of testamentary capacity and for exercise of undue influence, the contestants offered to prove the testator's declarations, made after the execution of the will, to the effect that in the making of it he had been imposed upon by those in whose favor it was made. The offer was refused, and upon that ground the case was removed to this court. "The court appears," said Mr. Justice Rogers, "to have excluded the testimony because they chose, contrary to the offer, to suppose it was designed to prove duress, for which purpose it would be clearly inadmissible. But the court had no right to act on the supposition that the testimony was proposed in bad faith. As it was offered for a legitimate purpose, for that purpose it ought to have been

received. If attempted to be used for a different purpose, the correction was in their own hands; the counsel would subject themselves to the severest censure. If the facts were as represented, it was evidence of imbecility of intellect amounting almost to fatuity." To the same effect is the current of authorities in other states: *Robinson v. Hutchinson*, 26 Vt. 38; 60 Am. Dec. 298; *Richardson v. Richardson*, 35 Vt. 238; *Shailer v. Bumstead*, 99 Mass. 112; *Kinne v. Kinne*, 9 Conn. 102; 21 Am. Dec. 732; *Provis v. Reed*, 5 Bing. 435; *Jackson v. Kniffen*, 2 Johns. 31; 3 Am. Dec. 390; *Pemberton's Will*, 40 N. J. Eq. 349; *Waterman v. Whitney*, 11 N. Y. 157; 62 Am. Dec. 71; *Stevens v. Vancleave*, 4 Wash. C. C. 265. In order that the declarations of the testator may be considered at all upon an issue of undue influence, there must be proof of other facts and circumstances indicating circumvention or fraud in the procurement of the will: *Tawney v. Long*, *supra*; for they are received, not as proof of the fact, but merely to show that there are special grounds for apprehending and unusual opportunities for exercising undue influence, and to illustrate the effect of such influence after its existence has been established; unless, perhaps, as part of the *res gestæ*, when they are made at the very time of the execution of the will, and form part and parcel of the transaction: *Smith v. Fenner*, 1 Gall. 172; *Boylan v. Meeker*, 28 N. J. L. 274; *Harrison's Appeal*, 100 Pa. St. 458.

The weakness of mind, and consequent susceptibility to influence, which is admissible in such a case must be shown to exist at the very time of the testamentary act; whilst the testator's declarations directly show only the state of his mind when they were made. Declarations made before and after have some significance, however, in showing, inferentially, the mental condition at the time of the testamentary act. The limitations which govern the admission of this quality of evidence must depend largely on the character of the unsoundness attempted to be proved. There are types of mental unsoundness which appear suddenly, and may be of short duration, and in such cases, the proof, to be of any avail, must come near to the precise time when the act was performed; but the decadence of old age, and many forms of mental derangement and imbecility, are of slow advancement, and proof of their distinct development, at any given period, will afford pretty clear ground to infer their existence for a long period, either before or after, with a considerable degree of certainty: *Grant v. Thompson*, 4 Conn. 203; 10 Am. Dec.

119. Therefore, declarations made several years, even, before the execution of a will, may be proven to show unsoundness or imbecility of mind of a permanent character; and declarations made after may, in like manner, tend to show such a fixed perversion or imbecility of mind as would not be likely to have occurred in any short period of time; and both or either may afford some just ground of opinion in regard to the state of the testator's mind at the date of the testamentary act: Redfield on Wills, 549. The court must judge, in each particular case, how far it will be profitable to extend the rule before and after the precise date in question: *Grant v. Thompson, supra*.

As the proof of the testator's declarations are only admissible in this case to show the state of his mind, and the effect of undue influence, if any is shown to have existed, we cannot say, in view of the particular type of mental unsoundness alleged, and the peculiar circumstances of this case, that the scope of the investigation was too wide. Of course, the objective point of inquiry, in every case, is the state of mind at the precise date of the testamentary act, but as it is not practicable in all cases to make that inquiry in a direct manner, some latitude of proof must be allowed.

At the first trial of this case, the learned judge of the court below instructed the jury, in the most explicit and proper manner, that these declarations of the testator were not evidence at all, as to the fact of undue influence, because there was no evidence that they were true; "for all that appears," says the learned judge, "they may have been the expression of a mere delusion on the part of the testator." At the second trial, however, the court received the evidence and submitted it to the jury, without any qualification whatever. Whether this omission was the result of a change of opinion respecting the force of the evidence, or was a mere inadvertence, or whether the learned judge inferred from the opinion of this court, delivered when this case was here before, that such declarations were deemed proper evidence of undue influence, we cannot say; of one thing we are certain, that the failure to qualify the effect of this evidence was fatal to the defendants' case. There is, in the concluding clause of the opinion referred to, enough, perhaps, to give the impression that the declarations of the testator made a few days prior to his death, as to his unsuccessful attempt to get possession of his will from Lynn, followed by his exclamation on the day of

his death, "Mein Gott in Himmel, es is alles letz, alles letz," — "My God in Heaven, all is wrong, all is wrong," — were deemed proper evidence of undue influence. But the law is too well settled on this point to admit of any doubt. The testimony was admissible, perhaps, but it was for the consideration of the jury only in a certain event, and then for a special purpose, to show the state and condition of the testator's mind; and as the declarations were made eight years after the execution of the will, and four years and two years after the making of the codicils respectively, and then were uttered almost in the last moments of the testator's life, they were, it must be conceded, of little force or inferential effect, under the circumstances, even as to that. We then said in advance we could not "say that the answers to the proposed questions would not indicate the exercise of undue influence," etc. Now that the answers are before us, we can without any hesitation say that they are not. The defendants' counsel, by a point more particularly directed to this branch of the evidence, might have directed the attention of the court to the proper application of this part of the evidence in a more direct manner than appears to have been done; but we think the question is raised in the answers to the defendants' fifth and sixth points. Although these points were not directed to the precise question now under consideration, yet the answers of the court proceed plainly upon the assumption that the testator's declarations might be regarded as indicating undue influence, or present constraint, operating upon the mind of the testator in the testamentary act; and upon this ground the judgment must be reversed.

In the former opinion of this court, it was held that the evidence was sufficient to justify a submission to the jury. The testimony was then and is now very voluminous, the evidence embracing over one thousand pages of printed matter; and perhaps we did not give it that exhaustive examination and patient study which we have since been able to do. The whole case is now before us, and we are constrained to say that the testimony bearing upon the precise question at issue is certainly of the most meager, unsatisfactory, and inconclusive character.

It is said that Jackson Herster stood in a confidential relation to the testator; that he was the testator's son, and was to some extent intrusted with his father's business; but he was not present at the making of the will, nor does it appear that

it was made by counsel at his procurement. The testator went to Mr. Lynn, who had been his attorney and counselor for fourteen or fifteen years, and, in the absence of all his children, with the greatest deliberation arranged for the preparation of his will. That Jackson was a son was certainly in his favor; that he was intrusted with his father's business, and in this respect occupied a confidential relation towards him, is also a circumstance in his favor, if he performed his duty faithfully and well, and did not take advantage of his position, or abuse the confidence reposed in him in the procurement of the will. There is not the slightest proof that he took any part in the actual preparation of the will, or of any of the codicils; indeed, that he was even present when they were made and written, or when they were signed. Under these circumstances, the burden of proving undue influence is clearly upon those who allege it.

The unequal disposition which the testator made of his property, under the circumstances of this case, is not of great significance. "There may be cases," as was said in *Patterson v. Patterson*, 6 Serg. & R. 56, "where this internal evidence, added to other proof, which would of itself leave the question doubtful, ought to turn the scale." But the inequality in the provisions of this will, taken in connection with all the evidence referred to, is not such as would induce any reasonable belief that in the making of it the testator was acting under any improper influence; and especially is this so, in view of the evidence which has been introduced to explain the reasons and disclose the motives which probably actuated the testator in this disposition of his property. The very object of making a will is to disturb the equality of distribution which the law establishes in the absence of one; and whether the reasons for it, in the testator's mind, are well or ill founded, is immaterial, if he has arrived at the result of his own volition, and without any fraud, coercion, or constraint of others. It is only when the will is grossly unreasonable in its provisions, and plainly inconsistent with the testator's duty to his family, that in case of doubt the inequality can have any effect on the question of undue influence. The evidence in this case is not, in our opinion, of such a character as to leave the question at issue in doubt. On the contrary, the uncontradicted proofs abundantly explain the testator's motives in making his will as he did.

Apart from the internal evidence supposed to be afforded by

the will itself, and the confidential relation referred to, and applying the declarations of the testator as evidence of the state and condition of his mind, the evidence of undue influence consists mainly of the testimony of five witnesses, viz.: Amandus Frey, Charles Halbing, Hannah Weaver, Samuel Weidnecht, and Henry Weidnecht. The circumstance related by Amandus Frey is of the most inconsequent character. In the year 1880 or 1881, he told the testator he had a lot on College Hill that Jacob would like to have; the price was seven thousand five hundred dollars; the old man promised to go up and see; failing to do so, Frey went to see him again. He says: "I told him, 'Daddy, you did not come up to see my place.' He said, 'No, I did not'; then he said something about having a fall and hurt his thumb or finger, I forget what it was, and he couldn't get up, but that his son Jake told him that the property was cheap, and they might as well buy it, because they had the money lying idle; but he said, 'I'll see Jack first'; and then he called Jack, and he told Jack about it and said, 'Here's Frey about that lot on College Hill; Jake says it is cheap, and we might as well buy it'; Jack said, 'No, father; we have got enough borough property; if we want to buy property, buy farms.' Then the old gentleman said, 'Well, if you say so, all right'; and that ended the matter."

Charles Halbing lived in the testator's family from April, 1880, for nine months; he returned in the spring of 1881, and left some time previous to the old man's death. His testimony relates chiefly to the conversation of the family whilst at their meals. In speaking of what Jack and his wife said at the table, in the old man's presence, he says: "They allowed that Jake's children were running around and spending their money, and if he got such things he would not take care of them."

Q. Was this said upon more than one occasion, or only once? A. Frequently.

Q. What effect did it have, apparently, upon the old man?—what would he say? A. Well, he would generally side in with the family.

Q. Did you ever hear anything said about Henry or his wife or children? A. Yes, I did.

Q. What did he say about them? A. Well, no offense to the lady there or the family; I shall speak the remark as it was spoken at the place.

Q. Who said it? A. Jack Herster; "Beck, fat Beck."

Q. What did he say about them, besides? A. Well, that the children were no good, running around and out on the streets nights, and Henry Herster running around, and the like of that.

Q. Did you hear Jack say anything about his sister Susan? A. Yes; Mrs. Keiper and her Rosa.

Q. What did he say about her? A. That they were a stuck-up set, and that if they got anything they would not take care of it.

Q. When they said this, what did the old man say? A. Well, the old man would side in with them; he would have the same opinion, apparently, to me.

Q. Did he say anything about Eliza,—Mrs. Reich? A. Yes.

Q. I mean Jack; what did Jack say? A. As I understand, Mr. Reich stole a cow, and drove her to Allentown or Catsauqua,—I am not certain which of the two places,—and sold his cow, and the old man of course had bitter feelings against Mr. Reich on that account, and I have often heard the remark made that they should not have anything.

Q. Heard Jack say it? A. Yes.

Q. Was anything said about Dan by Jack? A. Yes.

Q. What? A. Said that Dan was a drunken man, and did not take care of his business; that he owed the old man so much money for cattle, as I understood, and that he had had enough for his share, and would not get any more; and his Irishwoman and the two boys they would n't get nothing.

Q. Dan's wife was an Irishwoman, was she? A. As I understand it; yes.

Q. What effect did that have on the old man? A. Well, he would have the same opinion.

Q. Would he be in a good humor or angry? A. He certainly would be out of humor when the rest spoke that way, and he would side in with them.

Q. Would he swear any? A. He never would curse any; oftentimes in German he would use an oath, but I never heard him go to the extreme.

Q. What would he say in German? A. He would say, "Sockement," and the like of that.

Hannah Weaver was employed as a servant in the family in the year 1877. She says: "Rose Keiper,—that was Susan Keiper's daughter,—yes; she came there one day; I think it was on Saturday, and she came there with some flower-seeds,

and she had a brown silk dress on, and the door was open between the kitchen and the old man's room, and so I said: 'Was that Miss Keiper,' after she was gone, and she said: 'Yes, that was Rose Keiper; but she would not need to put a silk dress on to come up here to me'; and then the old man said something, but I am not positive what he said, but he was very angry about it."

Q. Did Mrs. Herster say anything more to him about not holding out, or anything of that kind? A. Oh, yes; she said that wearing them silk dresses, she said that that would not hold out; and then the old man said: "Yes, it won't if they have got to have it from me"; something in that way it was.

Q. Do you remember on different occasions anything being said to the old gentleman about the different children, by Mrs. Andrew Herster? Do you remember anything being said there at breakfast about not being able to sleep at night? A. Yes; one morning the old man got up and was angry,—that was the old man Herster.

Q. Who else was there then? A. I and Jackson and his wife and the boys at the table, and then they said they could not sleep at all last night.

Q. Who said that first? A. Why, Jack.

Q. Then what did the old man say? A. That he could not sleep, neither; and then Jack said: "Yes, they were playing on the piano all last night."

Q. Who? A. Why, Jack said that,—that he could not sleep; that Henry's children were playing on the piano all night, and then he said, "Yes, he better—"

Q. Who? A. Why, the old man said he better learn his girls to play on the piano; but when Clara comes round I will give it to her.

Q. What did Mrs. Jack Herster say? A. "Yes," she said, "If I had girls, you bet they would learn to milk."

Q. What was the old gentleman's manner? A. Well, he was cross,—angry.

Q. Did you ever hear any piano-playing over there? A. No; I slept on the third story, and I did not hear any.

Q. Did you ever hear any piano-playing over there? A. No; I heard a little music over there, but I don't know what it was, whether it was an accordion or a mouth-organ, or whatever, but I never heard a piano.

Q. Do you remember anything being said about how the piano was brought there? A. Yes; the piano was brought in

there, and it was so large they could n't hardly get it in the house.

Q. Who said that? A. Mrs. Jackson Herster.

Q. When? A. The same morning at the table; she said that they brought the piano, and it was so large they could not get it in the door hardly, and it is about all that was said.

Q. Do you remember on any other occasion, when anything was said about Daniel? A. I think it was something, but I cannot just remember how it was.

Q. Do you remember anything being said about his being drunk? A. Yes; it was said that he was a regular drunkard.

Q. Who was that by? A. It fell at the table, but I cannot tell whether it was Jackson or his wife; it was either one; they said it to the old man, and I sat by and heard it.

Samuel Weidnecht testifies that the old man in any business matter would generally have his own way with other people, but he generally agreed with Jackson.

Henry Weidnecht says that the old man seemed to be guided a great deal by Jackson, and was different in his manner toward Jackson from what he was to other people.

Reuben Kolb testifies that he seemed to be a little afraid of Jackson, that is, more yielding; that he was usually a man of much determination, and was firm in his opinion with others, but that he yielded readily to Jackson.

This is a summary of all the testimony bearing directly upon the fact of fraud or undue influence; and consisting as it does of matters occurring some three years and some six years after the will was made, it is certainly of the most inconclusive character. There is, in our opinion, no evidence from which a jury would be justified in inferring fraud, duress, or undue influence in the making of this will. In an issue *devisavit vel non* the question of mental unsoundness, or of undue influence, ought not to be submitted to the jury where the evidence is of such unsatisfactory character that the court would not sustain a verdict upon it: *Wilson v. Mitchell*, 101 Pa. St. 505. "A court of law," says our brother Paxson, in *Kauffman v. Long*, 82 Id. 72, "has a higher duty to perform than merely to answer points of law. It is its duty to see that the law is faithfully administered, and such administration requires that a man's will, the most solemn instrument he can execute, shall not be set aside without any sufficient evidence to impeach it. There is no redress here for an erroneous or improper verdict. But where a case is

submitted to a jury upon clearly insufficient evidence, such as no court ought to sustain a verdict upon, it is our plain duty to reverse: *Sartwell v. Wilcox*, 20 Pa. St. 117; *Lower v. Clement*, 25 Id. 63; *Silveus v. Porter*, 74 Id. 448." "This court has indicated in a number of cases," says our brother Green, in *Herster v. Herster*, 116 Id. 612, "a rule by which to determine the granting of an issue, and it is equally applicable in determining whether a cause of this kind ought to be withdrawn from the jury. It is thus expressed in a recent case: 'If the testimony is such that after a fair and impartial trial resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence, it cannot be said that a dispute within the meaning of the act has arisen. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed. This simple and only safe test is supported alike by reason and authority': *Knauss's Appeal*, 114 Id. 10." Applying this rule, which would seem to be well settled, to the evidence in this cause, it must be conceded, we think, that it is wholly insufficient. Upon a careful review of all the testimony, this verdict could not be sustained; the court should have set it aside as contrary to the manifest weight of the evidence. And if this is so, it is, on an issue *devisavit vel non*, good ground for reversal here.

The facts exhibited in evidence in this case to establish undue influence are, in general, of the most trivial character. The most grievous matters alleged are that Jackson said Eliza Reich's husband stole a cow, and that Dan was a drinking man,—facts, however, which do not seem to be seriously denied. It does appear that Henry never had a piano, and it is probable that the old man knew that he had not, as he was actively engaged about the house for five years after this alleged misrepresentation. Statements to the effect that Jacob's children were "running around spending their money," that Henry's were "out on the streets nights," and that Mrs. Keiper's were a "stuck-up set," are criticisms that may have been well or ill founded, according to the standpoint from which their conduct was observed, and the peculiar notions and temper of the observers. At the best, however, they have little if any force in establishing fraud or undue

influence in the procurement of this will or of the codicils. And especially is this true in view of the fact that the alleged declarations were not only made after the will was executed, but several years after. There is some evidence of mental impairment, but the testimony is overwhelming that notwithstanding this impairment the testator retained a business capacity rarely found among persons of his age who have never been afflicted as the testator was. There is no evidence whatever of any statements made by Jackson or his wife to the prejudice of his brothers and sisters at, or at any time before, the making of the will. In order to invalidate a will, there must be evidence direct or circumstantial of a present operating restraint at the time of making it: *Eckert v. Flowry*, 43 Pa. St. 52; *Wainwright's Appeal*, 89 Id. 220. Influences which do not appear to be connected with the testamentary act are not sufficient to impeach a will: *McMahon v. Ryan*, 20 Id. 329.

If we are right in the views we have already expressed, it is wholly unnecessary to consider the several assignments of error in detail. The plaintiff has made no case for the consideration of a jury; and as the whole case must go down, all questions incidentally arising during the progress of the trial go down with it.

The judgment is reversed.

WILLS. — Mental capacity required in making: *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489, and note 495; *Trost v. Dingler*, 118 Pa. St. 259; 4 Am. St. Rep. 593. No higher degree of testamentary capacity is required in the execution of a will than in its revocation: *McIntire v. Worthington*, 68 Md. 203. The law gives to every man of sound mind the right to make a will. Testamentary capacity is mainly a question of fact. Testator must have sufficient capacity to comprehend the conditions of his property, his relations to the persons who should or might be the objects of his bounty, and the scope and bearings of all the provisions in his will. The capacity to be inquired into is that which is present only at the time of the making of the will. The soundness to be ascertained is that of mind, not of body: *Chrisman v. Chrisman*, 16 Or. 127; *McCulloch v. Campbell*, 49 Ark. 367.

WILLS — UNDUE INFLUENCE. — PERSUASIONS, APPEALS TO THE AFFECTIONS, of ties of kinship, to sentiments of gratitude or pity, etc., do not constitute undue influence; but pressure of whatever nature, whether acting on fears or hopes, if so exerted as to overpower the volition without convincing the judgment, is undue influence: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712, and note 720; *Taylor v. Kelley*, 31 Ala. 59; 68 Am. Dec. 150; *Baldwin v. Parker*, 99 Miss. 79; 96 Am. Dec. 697; *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735. Undue influence depends upon the facts in each case. Where influence induced testator to make grossly unequal dispositions of property or disregard the ties of blood without sufficient reason,

such influence may be treated as undue: *Hartman v. Strickler*, 82 Va. 225. Undue influence invalidating a will is not that which springs from natural affection, or is acquired from kind ministrations, etc., but is such as results from fear, coercion, or any other cause which takes away the free agency of the testator: *McCulloch v. Campbell*, 49 Ark. 367. The existence of undue influence may be inferred from facts and circumstances in absence of positive evidence thereof: *Saunders's Appeal*, 54 Conn. 108. Compare *Muir v. Miller*, 72 Iowa, 585.

PREFERENCE OF COLLATERAL RELATIVES OVER WIFE DOES NOT NECESSARILY raise presumption of fraud, or render the will invalid for undue influence: *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235. Compare *Smith v. James*, 72 Iowa, 575. Suspicion of fraud and undue influence usually attaches to a bequest to one's mistress, especially if it be unnatural. Disproportionate bequest to wife rarely raises the presumption of undue influence, as in the case of a mistress: *McClure v. McClure*, 86 Tenn. 173.

UNITED BRETHREN MUTUAL AID SOCIETY v. McDONALD.

[122 PENNSYLVANIA STATE, 324.]

LIFE INSURANCE — INSURABLE INTEREST. — To support a contract of insurance on the life of one person in favor of another, there must be a reasonable ground, founded in the relations of the parties, either pecuniary or of blood or affinity, to expect some relief or advantage from the continuance of the life of the insured.

LIFE INSURANCE — PRESUMPTION OF WAGER — JURY. — In the absence of an insurable interest of one person in the life of another, the law will presume that the insurance was procured for the purpose of a wager or speculation, and the question is not one to be submitted to the jury.

LIFE INSURANCE — STEP-FATHER AND STEP-SON. — A step-son has no insurable interest in the life of his step-father, where he has a separate home and family of his own, and is not a creditor nor in any way dependent upon or responsible for the support of the step-father.

DEBT by Michael McDonald against the United Brethren Mutual Aid Society of Pennsylvania, on a policy of insurance issued by the defendant on the life of Roger McDevitt, payable to the plaintiff. The application stated that McDonald was the step-son of McDevitt, and that all dues and assessments were to be paid by the former. It appeared that McDevitt was married to McDonald's mother, and that several years before the policy was issued, she had died, and McDonald had married and was living in his own home, separate from his step-father. The court submitted the question to the jury, whether the policy was taken out for the purpose of wager or speculation. There was a verdict and judgment for the plaintiff, and the defendant brought error.

S. J. M. McCarrell, David Fleming, John H. Weiss, and Lyman D. Gilbert, for the plaintiff in error.

Casper Dull, for the defendant in error.

CLARK, J. This suit was brought on a policy of life insurance, issued by the United Brethren Mutual Aid Society, etc., March 22, 1882, upon the life of Roger McDevitt. The application for the policy provided that "the certificate of membership should be issued in favor of and be payable to Michael McDonald," who was "to pay all dues and assessments." The policy itself, after stating that Mr. Roger McDevitt "had paid twenty-four dollars as his annual payment" and had become a member in said United Brethren Mutual Aid Society of Pennsylvania, etc., provides that "this membership entitles Michael McDonald, his heirs and assigns, upon the death of said Mr. Roger McDevitt, to three thousand dollars." Had Michael McDonald such an interest in the life of Roger McDevitt as would support the policy?

It cannot be pretended that the mere fact that McDonald was a step-son of McDevitt would create an insurable interest; no case has been brought to our notice which carries the rule to that extent. It is a rule founded in public policy, and is of general application, that the contract of life insurance must be based upon an interest in the subject insured; in the absence of an insurable interest, the policy, having nothing upon which to operate, must be regarded as a mere wager upon human life. In all cases, as we said in *Corson's Appeal*, 113 Pa. St. 445, 57 Am. Rep. 479, there must be a reasonable ground, founded in the relations of the parties, either pecuniary or of blood or affinity, to expect some relief or advantage from the continuance of the life of the insured; otherwise, the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. Such policies having a tendency to create a desire for the event are, independently of any statute on the subject, condemned as being against public policy. The foundation of the doctrine is, that no one shall have a benefit of any kind in a life policy who is not presumed to be interested in the preservation of the life of the insured: *Gilbert v. Moose*, 104 Pa. St. 78; 49 Am. Rep. 570.

Roger McDevitt was married to McDonald's mother, but she had died some years before the policy issued. McDonald was a married man; he had a separate home and family of his

own; he was a step-son, but was not otherwise related to McDevitt, either by blood or marriage. Nor was he a creditor of McDevitt, or in any way dependent upon him or responsible for his support, or otherwise. The plaintiff testifies they had helped each other at times, but that McDevitt owed him nothing; he says that he had a stroke of paralysis, and his wife got him to take out the policy to protect her if he died; she thought he was likely to die first, but it was for the benefit of whichever lived the longest. And although the policy states that the first annual payment of twenty-four dollars was paid by McDevitt, the plaintiff unequivocally testified that he paid all the money that was paid on it. It is very plain from all the testimony that McDevitt simply suffered the use of his name; that the insurance was effected at the suggestion of McDonald or McDonald's wife, at their own expense, for their exclusive benefit. We fail to discover any insurable interest Michael McDonald had in the life of Roger McDevitt; there is, therefore, nothing to support the policy.

It is the absence of this insurable interest which gives to the policy the character of a wager contract; there can arise in such case no question of motive or good faith: *Downey v. Hoffer*, 110 Pa. St. 109. The rule, applicable alike to life and fire insurance, rests in public policy for the protection of human life and property: *Stoner v. Line*, 16 Week. Not. Cas. 187; *Keystone Mut. B. Ass'n v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572. The motive and intentions of Michael McDonald may have been good, but the fact remains that he had no interest in the life of Roger McDevitt, and having no such interest, as we said in *Seigrist v. Schmoltz*, 113 Pa. St. 326, the sooner that life was extinguished the better it was in a pecuniary point of view for the beneficiary. Whether the policy was taken out for the purpose of a wager or speculation, — that is to say, whether or not this was the motive and intention of the beneficiary named in it, under the circumstances of this case, — was not a question for the jury; in the absence of any insurable interest whatever, the law will presume this to be so.

The judgment is reversed.

LIFE INSURANCE. — INSURABLE INTEREST IN LIFE OF ANOTHER, NECESSITY OF, and when it exists: See note to *Keystone Mutual Benefit Ass'n v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 573.

LIFE INSURANCE. — INSURABLE INTEREST IN THE LIFE OF ANOTHER, such as will take contract out of wager class, must arise from the relation of the
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party taking the insurance to the insured, either as surety or debtor, or from ties of blood or marriage, so that from the relation thus established there may be some expectation of benefit or advantage in the continuance of the life of the insured: *Keystone Mutual Benefit Ass'n v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 573.

SPANGLER v. SPANGLER.

[122 PENNSYLVANIA STATE, 358.]

STATUTE OF LIMITATIONS—NEW PROMISE BY DEBTOR TO STRANGER.—

Promise to pay a debt barred by the statute of limitations must be made to the party interested, or to his agent, to remove the bar of the statute; and evidence that the debtor stated to a stranger that he had acknowledged the indebtedness to his creditor, and promised to pay it, is not a promise made to the creditor or his agent, and is therefore insufficient to remove the bar.

ASSUMPSIT, brought July 28, 1887, by Franklin J. Spangler against Sarah M. Spangler, executrix of the will of Emanuel Spangler, deceased, to recover a sum of money belonging to the plaintiff, which had been paid to Emanuel Spangler, his father, April 1, 1865. The defendant pleaded the statute of limitations. A witness, who was a stranger to the transaction, testified, against the defendant's objection, that, in 1884, Emanuel Spangler had told him that he had had an interview with his son Franklin a short time before, and that he had told Franklin he owed him the money and intended to pay him. There was a verdict and judgment for the plaintiff, and the defendant brought error. The assignments of error relate to the admission of this evidence, and to the refusal of the court to charge that the verdict must be in favor of the defendant.

David Wills and George J. Benner, for the plaintiff in error.

J. C. Neely, for the defendant in error.

GREEN, J. The proposition that a promise to pay a debt, otherwise barred by the statute of limitations, must be made to the party in interest or his agent, in order to toll the statute, has been definitely settled by several decisions of this court. In *Gillingham v. Gillingham*, 17 Pa. St. 302, Coulter, J., said: "This case is ruled by *Kyle and Wells*, decided at this term, the opinion in which case was foreshadowed by *dictums* in *Morgan v. Walton*, 4 Id. 321, and in *Christy v. Flemington*, 10 Id. 129, and which establishes definitively and distinctly that a promise to take the case out of the statute of limitations

must be made to the plaintiff or his agent." In *McKinney v. Snyder*, 78 Id. 497, the subject was fully reviewed by our brother Paxson, who carefully stated the difference between our own decisions and those of England and some of our sister states, and who concluded his observations by saying: "A promise made to a stranger is a mere declaration of intention, which the promisor may change at pleasure." Our latest utterance upon this subject was made in *Croman v. Stull*, 119 Id. 91, decided February 27, 1888: "It is settled law that the promise must be made to the plaintiff or his authorized agent. A promise made to a stranger, who has no interest in the transaction, does not bind the promising party." This is enough. We think it should be understood now that this is the law of our state.

In the present case there was no testimony showing a promise or acknowledgment made by the debtor to the creditor.

There was evidence that the debtor said to the witness, who was a stranger, that he had said to his creditor, who was his son, that he would pay him, and it is argued that this is the same thing as proof of a promise made directly by the debtor to the creditor. This, however, cannot be so in any point of view. The evidence is still that of a stranger testifying to a conversation with himself, and not with the creditor, and the only difference is as to the character of the conversation. In the one case, the declaration of the debtor is that he will pay the debt, and this, when made to a stranger, does not bind the debtor, not because it is not a promise of a sufficiently definite and binding character, but because it is made to one who has no interest. In the other case, the declaration is by the debtor that he told the creditor he would pay. This is no higher grade of promise than the former, and the medium of proof being of the same vicious character as the former, to wit, a declaration made to a stranger, its effect, as establishing an obligation, can be no greater. We are of opinion that the declarations received in evidence were not sufficient to toll the statute, and that the defendant's first point should have been affirmed. The assignments of error are all sustained.

Judgment reversed.

STATUTE OF LIMITATIONS. — Acknowledgment of debt made to stranger, and not intended to be communicated to creditor, will not remove the bar of the statute of limitations: *Parker v. Remington*, 15 R. L. 300; 2 Am. St. Rep. 897; *Matter of Kendrick*, 107 N. Y. 104.

STATUTE OF LIMITATIONS. — ACKNOWLEDGMENT SUFFICIENT TO TAKE DEBT OUT OF STATUTE OF LIMITATIONS: Note to *Parker v. Remington*, 15 R. I. 300; 2 Am. St. Rep. 897. A clear, distinct acknowledgment of a debt is sufficient to take case out of statute of limitations: *Yast v. Grim*, 116 Pa. St. 527. Acknowledgment from which promise may be implied must be unqualified: *Switzer v. Noffsinger*, 82 Va. 518. Admission by debtor in answer to creditor's bill cannot be subsequently used as bar to statute of limitations: *Holberg v. Jaffray*, 65 Miss. 526. Effect of acknowledgment of one partner after dissolution of partnership: *Clement v. Clement*, 69 Wis. 599. Promise to pay a barred debt when the promisor is able is conditional, and does not remove the bar of the statute until the debtor gets able: *Shown v. Hawkins*, 85 Tenn. 214; see also *Gathright v. Wheat*, 70 Tex. 740. Partial payment by one joint maker does not defeat operation of statute as to the others: *Bottles v. Miller*, 112 Ind. 584. A barred debt is revived by express waiver, on part of debtor, of defense of the statute of limitations, supported alone by his moral obligation to pay the debt: *Jordan v. Jordan*, 85 Tenn. 561.

COMMONWEALTH v. AMERICAN DREDGING COMPANY.

[122 PENNSYLVANIA STATE, 386.]

TAXATION — SITUS OF PERSONAL PROPERTY. — Visible, tangible, personal property, permanently located in another state, is taxable, it seems, within such jurisdiction, irrespective of the residence or domicile of the owner; but intangible property, such as bonds, mortgages, and other evidences of debt, is taxable at the domicile of the owner.

TAXATION — SITUS OF UNREGISTERED VESSELS. — Unregistered vessels, not permanently located anywhere, have their *situs* for taxation at the domicile of their owner, although, if registered, they are taxable at their home port of registry; and therefore unregistered vessels belonging to a Pennsylvania corporation, and not permanently located, but carried from state to state, are taxable in Pennsylvania, although they were built out of the state, and some of them were never within it.

APPEAL by the American Dredging Company to the court of common pleas of Dauphin County from the settlement by the auditor-general and state treasurer of taxes claimed to be due on the capital stock of the company. The court found that the defendant was a corporation chartered in Pennsylvania, with a capital stock of four hundred and ninety-five thousand dollars. A considerable portion of this capital stock was invested in lands and buildings situate in the state of New Jersey, and which the court held were not liable to taxation in Pennsylvania. Besides this, ninety-two thousand dollars was invested in four dredges, which were built outside of the state of Pennsylvania, three of which had never been within the limits of the state, and the fourth had never been within its limits until after the end of the tax year in ques-

tion; six thousand dollars was invested in a tug, which was built outside of the state, and was not within its limits during the tax year; and thirty-eight thousand five hundred dollars was invested in eleven scows, which were built outside of the state, and were never within its limits. During the tax year, the real estate and the other property were all employed for corporate purposes in the states of New Jersey, Maryland, and Virginia. The court also held that the dredges, tug, and scows were not taxable in Pennsylvania, and the state assigned this ruling as error.

W. S. Kirkpatrick, attorney-general, and John F. Sanderson, deputy attorney-general, for the plaintiff in error.

Lyman D. Gilbert, John H. Weiss, and J. Warren Coulston, for the defendant in error.

PAXSON, J. The court below correctly held that the defendant company was not liable to taxation upon so much of its capital stock as was represented by lands and buildings situate in the state of New Jersey; but we are of opinion that the learned judge erred in his ruling that the ninety-two thousand dollars of said stock represented by the four dredges, the tugboat, and the eleven scows, conceding that they, or at least a portion of them, were built outside of this state, and have never been within it, were not liable to taxation. This is not because of the technical principle that the *situs* of personal property is where the domicile of the owner is found. This rule is doubtless true as to intangible property, such as bonds, mortgages, and other evidences of debt. But the better opinion seems to be, that it does not hold in the case of visible, tangible, personal property permanently located in another state. In such cases, it is taxable within the jurisdiction where found, and is exempt at the domicile of the owner. Goods and chattels, horses, cattle, and other movable property of a visible or tangible character, are liable to taxation in the jurisdiction of the state wherein the same are, and are ordinarily kept, irrespective of the residence or domicile of the owner. Legal protection and taxation are reciprocal, so that such personal property and effects of a corporeal nature, or that may be handled or removed as receive the protection of the law, are liable to be taxed by the law where they are thus protected: Rorer on Interstate Law, 204, and cases there cited; Potter on Corporations, secs. 189, 190; Pierce on Railroads,

472. No fault is found with this principle, but does it apply to the facts of this case?

It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state. From the nature of the business, it is in one place to-day and in another to-morrow, and hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or interstate commerce is, that their *situs* for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered: *Pullman Palace Car Co. v. Twombly*, 29 Fed. Rep. 660; *Hays v. Pacific Mail Steamship Co.*, 17 How. 596. These vessels, if they may be so called, were not registered. Hence their *situs* for taxation is the domicile of the owners. This rule must prevail, in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state.

Judgment reversed, and a *procedendo* awarded.

TAXATION — PERSONAL PROPERTY. — A transfer-boat registered at Cairo, Illinois, plying between that place and Fillmore, Kentucky, on the opposite shore of the river, and owned half by a railway corporation of another state, and used for the transfer of cars of both companies, laid up at Cairo when not in use, etc., is taxable to both corporations at Cairo: *Irvin v. New Orleans etc. R'y Co.*, 94 Ill. 106; 34 Am. Rep. 208.

TAXATION. — PERSONAL PROPERTY MAY BE TAXED where it is permanently located, although, in general, personalty follows residence of owner, and is there taxable: *Mills v. Thornton*, 26 Ill. 300; 79 Am. Dec. 377; see *Grand Prairie Tp. v. Schure*, 24 Neb. 354.

TOWNSHIP OF SNYDER v. BOVAIRD.

[122 PENNSYLVANIA STATE, 442.]

TOWNSHIP ORDER — NEGOTIABILITY — ACTION BY ASSIGNEE. — Township order is not such a negotiable instrument that the holder thereof may bring a suit thereon in his own name, in Pennsylvania.

TOWNSHIP ORDER — INTEREST. — Township order will not bear interest, in Pennsylvania, although interest may be recovered, under certain circumstances, in a suit on the original indebtedness.

SUPERVISORS OF TOWNSHIP — POWER TO TAKE UP OLD ORDER AND ISSUE NEW ONE. — Supervisors of township, in Pennsylvania, have no power to take up a township order, issued by the auditors, and give a new one in its stead.

ASSUMPSIT, brought April 16, 1887, by Charles Bovaird, against the township of Snyder. The plaintiff declared specially upon the following order, signed by the supervisors of the township, and then added the common counts:—

“\$132.72.

No. 4.

“Brockwayville, June 15, 1885. Supervisors of Snyder township: Pay Charles Bovaird one hundred and thirty-three dollars and seventy-two cents, for old order returned.”

The defendant pleaded the general issue and the statute of limitations. It appeared that one R. K. Morey was a supervisor of the township for the year ending March, 1881, and that, for services rendered the township, the township auditors, after examining and passing upon his accounts, signed and issued to him the following order:—

“\$106.57.

No. 15.

“Brockwayville, Pa., March 14, 1881. The supervisors of Snyder township will receive this order from R. K. Morey or bearer for the sum of \$106.57.”

On the day the order was received, Morey presented it for payment to James McMinn, one of the newly elected supervisors. Payment was refused for want of funds, and the following memorandum was indorsed and signed by McMinn on the back of the order: “March 14, 1881, presented to the supervisors.” During the same year, Morey transferred the order in the regular course of business to the plaintiff, indorsing and signing on its back: “I assign the within order to the bearer.” The plaintiff retained the order until June 15, 1885, when he presented it, and it was taken up by the supervisors, and the new order, above quoted, was issued in its stead for the original amount, with interest from March 14, 1881. The plaintiff, after proving the original order and its consideration, offered the order and its indorsements as evidence of the amount of the indebtedness and the date of the presentment to McMinn. The offer was objected to on the ground, among others, that the order was not negotiable, but the court overruled the objection, and admitted the evidence, for the purpose offered, and to show a liquidation by the auditors of the indebtedness to Morey. The plaintiff then offered the new order in evidence, but it was objected to on the ground that the supervisors could not take cognizance of the original order except for the purpose of payment. The court, however, admitted it as “corroborating the fact of indebtedness, not to

show a substantive claim." The court charged the jury that the question whether the legal or the equitable plaintiff was entitled to recover was immaterial, and that if the township was indebted to Morey in the sum of \$106.57, and he afterwards demanded payment of the proper officers, and payment was refused, then the plaintiff, under the circumstances proved, was entitled to recover the amount of this indebtedness, with interest from the date of the demand. The court also charged, at the request of the plaintiff, that if the township owed this original indebtedness, and the same remained unsatisfied, and payment was unduly delayed, the plaintiff, in addition to the principal, would be entitled to interest thereon from the time Morey first demanded payment. The court finally refused a request by the defendant to instruct the jury that under the pleadings and evidence in the case the plaintiff could not recover. The plaintiff had a verdict and judgment in his favor, and the defendant assigned as error the admission of the plaintiff's evidence and the instructions given and refused.

Cadmus Z. Gordon, for the plaintiff in error.

W. F. Stewart, for the defendant in error.

PAXSON, J. There are numerous authorities which hold that a township order is not such a negotiable instrument that the holder thereof may bring a suit thereon in his own name. Nor will such an instrument bear interest. If the payment of a debt due by the township be unreasonably delayed, interest thereon may be recovered under certain circumstances in a suit on the original indebtedness: *Reeside v. Knox*, 2 Whart. 233; 30 Am. Dec. 247; *Warner v. Commonwealth*, 1 Pa. St. 154; 44 Am. Dec. 114; *Dyer v. Covington Township*, 19 Pa. St. 200; *Allison v. Juniata County*, 50 Id. 351; *East Union Township v. Ryan*, 86 Id. 459.

The plaintiff below contended, however, that the suit was not brought on the order, but on the original indebtedness. The declaration shows that the order was specially declared upon. It is true, the common counts in *assumpsit* were added, but there was no evidence upon which any of them could have been sustained. The only evidence which the plaintiff produced of any claim against the township was this order in favor of R. K. Morey, issued by the supervisors. Morey subsequently assigned this order to Charles Bovaird, the plaintiff. Some years afterwards, Bovaird presented this order to the

then supervisors, who took it up by giving him a new order in his own name, adding interest. Bovaird subsequently brought this suit, and upon the trial below, offered the order in evidence. The order was objected to, and the objection was overruled by the court, the learned judge, however, qualifying his admission by saying that it was received as "corroborating the fact of indebtedness, not to show a substantive claim."

The indebtedness referred to was an indebtedness of the township to R. K. Morey. This indebtedness was established by the settlement of the township auditors, and at the time of this suit was barred by the statute of limitations. There was no indebtedness on the part of the township to Bovaird, excepting as regards this order, and there was no evidence of any. Nor had the supervisors any right to take up the old certificate given by former supervisors to Morey, and issue a new one to Bovaird. It was no part of their duty. If the township owed Morey, it was their duty to pay him if they had the money; and if not, to levy and collect a tax for that purpose. While the order was not received by the court to show a substantive claim, yet it was the only evidence of any claim on the part of Bovaird. Moreover, its effect was to toll the statute, and permit a recovery on the part of the plaintiff.

All of the assignments of error are sustained. The defendant was entitled to a binding instruction in its favor.

Judgment reversed.

TERM "NEGOTIABLE," IN ITS ENLARGED SIGNIFICATION, APPLIES TO ANY WRITTEN SECURITY which may be transferred by indorsement or delivery, so as to vest in the indorsee such a legal title as will enable him to maintain an action thereon in his own name: *Odell v. Gray*, 15 Mo. 337; 55 Am. Dec. 147.

APPEAL OF CUNNINGHAM.

[122 PENNSYLVANIA STATE, 464.]

FIDUCIARY RELATION — EXECUTOR AND WIDOW — RELEASE — BURDEN OF PROOF. — Burden of proof is upon executor to show the fairness and good faith of the transaction by which he procured a release from the testator's widow, who was omitted from the will, of her statutory interest in the estate, because of the relation of trust and confidence which the executor occupies towards the widow, and especially when it appears that the executor procured the release immediately after the testator's death for a consideration less than one half of the widow's interest in the personalty alone, the value of the realty besides being upwards of ten thousand dollars.

APPEAL by Caroline M. Cunningham from a decree of the orphans' court dismissing her exceptions to and confirming the report of an auditor. William Household, the executor of J. Bennett Cunningham, deceased, on his final accounting, claimed a credit of \$3,680, paid the widow, the appellant, for a release of her interest in the estate. The appellant filed exceptions to the account, and an auditor was appointed to hear and determine the exceptions. The auditor found that the appellant and decedent were married in 1863 or 1864, and lived together for about two years, when the appellant voluntarily left her husband, and never afterward lived with him. Cunningham died on March 7, 1886, leaving a will, dated two days previous, which made no provision whatever for the widow. On March 8th, the will was admitted to probate, and letters testamentary were issued to William Household. On March 10th, Household and one Houseman went to the widow's house and procured from her a quitclaim deed, by which, for the consideration of \$3,680, she released the estate of all claim of dower, and her right to the personal property. Household paid her at the time \$30 in money, and gave a note for \$3,650. Household and Houseman testified that they fully informed the widow as to the probable value of the estate, and her rights therein, while their testimony was contradicted by the widow, who claimed that she had been defrauded. The value of the real estate and the personal property is given in the opinion of the court. The auditor thought that fraud must be established by proof so clear as to leave no room for hesitation or doubt, and that no fraud, undue advantage, or improper means were used to procure the release, and that, therefore, the sum paid the widow should be credited to the executor. The widow's exceptions to this report were dismissed, and the report confirmed, and she thereupon appealed.

James S. Moorhead and John B. Head, for the appellant.

Paul H. Gaither, J. A. Marchand, J. R. McAfee, D. S. Atkinson, and John M. Peoples, for the appellees.

STERRETT, J. The controlling question in this case is, whether the release, executed by appellant at the instance of the executor three days after the decease of her husband, divested her of all interest in the real and personal estate of which he died seised.

It is conceded that the learned auditor's findings of specific facts, connected with the execution of the release in question,

are in the main correct, but it is contended that he and the court below erred in the conclusion they drew from those findings; that instead of holding the release was *prima facie* binding on appellant, and debarred her from participating in the distribution unless she avoided its effect by proving that it was fraudulently procured, they should have held, in view of all the circumstances attending the execution of the release, that the burden was on the appellees to prove the fairness of the transaction, that the release was not procured by fraud, concealment, or other improper means, and that it was executed by appellant with full knowledge of the character, extent, and value of the estate, real and personal, and her interest therein.

The rule above stated, as to the burden of proof, results from the relation of trust and confidence which the executor occupies to the widow and devisees, especially in connection with the following, among other clearly established facts: The release was procured by the executor with unreasonable haste, within forty-eight hours after the funeral, and before either he or the widow, or any one interested in the estate, had or could have had such knowledge of its character, extent, or value as to enable them to act understandingly. The consideration for the release is less than fifty per centum of appellant's statutory interest in the personal estate as shown by the executor's account. In addition to that, her interest in the real estate, valued for collateral inheritance purposes at \$10,320, is by no means an inconsiderable item. According to the general appraisement made March 16, 1886, six days after the release was procured, testator's personal estate amounted to \$15,415.80, at which sum it was also appraised for collateral inheritance tax purposes. As ascertained by the executor's account, the personal estate "is \$16,372.98, which is reduced by debts, not including payment to the widow, to \$14,356.25."

After appellant had ascertained the amount of the personal estate, as shown by the inventory, she offered to surrender the note of \$3,650 and \$30 in cash given her by the executor, and demanded from him a surrender of the quitclaim deed and release executed and delivered by her to him for the benefit of the devisees under the will. The latter, as might have been expected, resisted the surrender.

It is not pretended, of course, that the executor was ignorant of the widow's statutory interest in her husband's estate, and that she had a right to demand and receive the same from

him, notwithstanding she was ignored by her husband in his will. It was far from being any part of his duty as executor to lend himself to the work of procuring from her, with such undue haste, and for the benefit of the devisees, a release of that interest for very much less than he knew, or ought to have known, it was worth. Other facts and circumstances, tending to show that appellant executed the release in ignorance of facts that were necessary to enable her to act understandingly, might be noticed, but those above referred to are quite sufficient.

Applying the rule of evidence above indicated, we are of opinion that the proof is insufficient to establish the validity of the release; and hence the court below erred in holding that it was binding on appellant, and precluded her from participating in the distribution of the fund in the hands of the executor.

Decree reversed, at the costs of appellees, and it is ordered that the fund in hands of the executor be distributed in accordance with the foregoing opinion.

EXECUTORS OF A WILL ARE TRUSTEES FOR WIFE, of property bequeathed by it to her separate use: *Robinson v. Dart*, Dud. Eq. 128; 31 Am. Dec. 569.

SIDNEY SCHOOL FURNITURE COMPANY v. WARSAW SCHOOL DISTRICT.

[122 PENNSYLVANIA STATE, 494.]

AGENCY — ACTS AND DECLARATIONS OF AGENT — EVIDENCE. — Agent's acts, during the progress of a transaction, while representing his principal, are so far part of the *res gestæ* as to be subsequently admissible in evidence on behalf of either party, and whenever his acts are admissible, then his declarations explanatory of those acts are also admissible; and it is not necessary that the agent himself be called to prove them.

NONSUIT — WHEN EVIDENCE IS TO BE SUBMITTED TO JURY. — There is in every case triable by jury a preliminary question of law for the court, whether or not there is any evidence from which the fact sought to be proved may be fairly inferred; if there is, that is sufficient to send the case to the jury, no matter how strong may be the proofs to the contrary.

NONSUIT — ACTION FOR PRICE OF GOODS SOLD — DELIVERY — AGENCY. — It is error for the court to direct a nonsuit in an action to recover the price of furniture sold to a school board, where the plaintiff proves the execution of the contract, and that it was authorized by the board, the shipment of the goods according to the terms of the contract, and the declarations of the secretary of the board, to whom the goods were to be shipped, when called upon by the plaintiff's agent for a settlement, that the goods

had arrived at their destination, but would not be received, as the board had rescinded the contract. There was sufficient evidence of a delivery, and under the circumstances it was not necessary to show the authority of the plaintiff's agent to demand a settlement, or that a demand had been made upon the board instead of upon the secretary.

ASSUMPSIT by the Sidney School Furniture Company against the Warsaw School District, to recover the price of school furniture sold by the plaintiff to the defendant. The opinion states the facts.

Alexander C. White, for the plaintiff in error.

B. J. Reid and E. H. Clark, for the defendant in error.

CLARK, J. At the trial of this case in the court below, the plaintiffs first gave in evidence the contract dated July 25, 1885, upon which the suit is brought. By the terms of this contract, the plaintiffs agreed to sell to the defendant a certain quantity and kind of school furniture of their own manufacture, to be delivered on board the cars at the factory, "in knock-down form," and shipped on or about August 10, 1885, to Mr. S. W. Temple, secretary of the board of school directors, at Brockwayville station, etc. The price, which was \$985.81, was payable on the arrival of the furniture at the place named, in school orders or bonds, bearing six per cent interest from October 1, 1885, until paid for, and to become due on the following dates: \$196.80, October 1, 1885; \$277.36, October 1, 1886; \$262.50, October 1, 1887; and \$249.15, October 1, 1888. They then offered the minutes of the board of school directors of Warsaw township, showing the purchase of the furniture by the board, and authorizing the execution of the contract. Mr. John Loughlin testified to the shipping of the furniture on the 6th of July, 1885. That he was mistaken as to the month is manifest, as the contract was not made until the 25th of July; he may have meant to say 6th of August, but no correction was made. There was some testimony by G. W. Brown, as to the arrival of part of the furniture at Brockwayville on the 16th of August. The plaintiffs then called H. M. Sweet, the plaintiffs' agent, by whom the contract was originally made on part of the plaintiffs; he stated that he had called upon Mr. Temple, the secretary of the board, on August 26, 1885, for the purpose of making a settlement; that he demanded the school orders provided for in the contract, but Mr. Temple, admitting that the desks had been delivered at

Brockwayville, said the board would not receive them; that the board had rescinded the contract; that it was not worth while for Sweet to see any of the other directors, as they did not intend to and would not accept the goods, and the school orders would not be delivered.

The plaintiffs, having made out what they thought to be a *prima facie* case, rested; thereupon the court entered a compulsory nonsuit, and subsequently refused to take it off; this is the error assigned.

It is contended on part of the defendant,—1. That there was not sufficient evidence to justify a jury in inferring the fact of a delivery of the goods in accordance with the contract; 2. That there was no evidence of Sweet's authority to demand a settlement, or to receive payment if there had been a delivery; and 3. That if he had such authority, the demand should have been made of the board, and not of the secretary. This contention on part of the defendant cannot be sustained. Mr. Temple was not only the secretary of the school board: he was the person to whom, by the terms of the agreement, the furniture was to be shipped and delivered; his acts and declarations, with respect to the delivery, were therefore the acts and declarations of the board; for in this he represented the board. Whenever an agent performs an act representing his principal, what he does or says in respect of the act while it is in progress is so far part of the *res gestæ* as to be subsequently admissible in evidence on behalf of either party, and whenever the agent's acts are admissible, then his declarations explanatory of these acts are also admissible; it is not necessary that he himself be called to prove them: Wharton on Evidence, sec. 1173; 1 Greenl. Ev. 113; *Hannay v. Stewart*, 6 Watts, 487; *Reed v. Dick*, 8 Id. 479.

When confronted by the plaintiffs' agent, Temple refused to accept the furniture, and what he said and did at the time of the refusal was part of the *res gestæ*; they were acts and declarations in the course of the business specially intrusted to him, and as such were evidence against his principals. His declarations were admissible, not so much perhaps for what he said as what he did; what he said shed light upon what he did, and we are thus enabled to scrutinize his acts according to his real intention. From what he said we know that the refusal to accept the goods was not because a part only had been delivered, for he admitted the delivery at Brockwayville; he made no objection on that account; this was not the

admission of a past occurrence: it was the statement of an existing fact, viz., that the desks were then in fact at Brockwayville, but the board through him refused to accept them. Nor was the refusal to settle with Sweet because of any want of authority in him from the Sydney School Furniture Company; the reason assigned was, that the contract was rescinded, and the goods upon that ground would not be accepted. Under such circumstances it was not necessary for Sweet to exhibit his authority; *non constat* if the board had been willing to close the matter, that his authority would not have appeared.

Nor was it required of the plaintiffs that the demand for settlement should be made upon the board of school directors as such; for it was not in the plaintiffs' power to convene the board, and they were certainly not bound to await the convenience or willingness of the school directors to assemble for this purpose; especially was this so if the board had already declined to accept the goods and refused to pay the price.

It is certainly true, as stated in the opinion of the learned judge of the court below, that the old *scintilla* doctrine has been long since exploded; the more reasonable rule is now, as stated by Mr. Justice Sharswood in *Howard Exp. Co. v. Wile*, 64 Pa. St. 201, that where there is any evidence which alone would justify an inference of a disputed fact, it must go to the jury. There is in every case triable by jury a preliminary question of law for the court, whether or not there is any evidence from which the fact sought to be proved may be fairly inferred; if there is, that is sufficient to send the case to the jury, no matter how strong may be the proofs to the contrary. It is unnecessary to cite authorities in support of a principle so plain; this is the doctrine now generally recognized, not only in the courts of this and the sister states, but also in the federal and English courts. In determining the sufficiency of the evidence, the court must of course take it as true, with every reasonable inference favorable to him who has the burden of proof: *Blakeslee v. Scott*, 37 Leg. Int. 474.

In this case the execution of the contract was admitted; that it was authorized by the board was shown by their minutes, and it was read in evidence; the secretary of the board, to whom the delivery was to be made, admitting that the desks were delivered at the place agreed upon, asserted that the agreement had been repudiated by the board, refused to receive the goods, and to pay the price. Certainly this presented

a case for the jury. We think the court erred in not taking off the nonsuit.

The judgment is therefore reversed, and a *venire facias de novo* awarded.

AGENCY — DECLARATIONS OF AN AGENT, WHEN ADMISSIBLE AS AGAINST PRINCIPAL: *Barkly v. Copeland*, 74 Cal. 1; 5 Am. St. Rep. 413, and note 415; *Coleman v. Colgate*, 69 Tex. 88.

APPEAL OF PITTSBURGH JUNCTION R. R. Co.

[122 PENNSYLVANIA STATE, 511.]

EMINENT DOMAIN — RAILROAD CROSSING LINE OF ANOTHER — PENNSYLVANIA ACT OF 1871. — Pennsylvania act of 1871, relating to crossings of lines of railroads by other railroads, has no application where one railroad company attempts to run its line through the yard of another company, and to cross its yard-tracks and switches.

EMINENT DOMAIN — RIGHT OF ONE CORPORATION TO TAKE PROPERTY OF ANOTHER. — Property already taken for one public use by a corporation cannot be taken by another corporation for another use, except by express grant or by necessary implication, although the franchises of a corporation are property, and may be taken under the power of eminent domain.

IMPLICATION OF RIGHT OF ONE CORPORATION TO TAKE FRANCHISES OF ANOTHER. — Implication cannot exist in favor of the right of one corporation to take the franchises of another corporation under the right of eminent domain, unless it arises from a necessity so absolute that without it the grant itself would be defeated, and not a necessity created by the corporation itself for its own convenience or for the sake of economy.

RIGHT OF ONE RAILROAD COMPANY TO TAKE PROPERTY OF ANOTHER. — Lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as right of way by another company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy; and this rule is not confined to the tracks or right of way of the company, but extends to the grounds occupied by all the appliances necessary for the successful operation of the road, and the company has a right to construct its road and make its plans with a liberal consideration for the future as well as the existing necessities.

BILL in equity by the Allegheny Valley Railroad Company to restrain the Pittsburgh Junction Railroad Company from taking a portion of the complainant's property under the right of eminent domain. The defendant appealed from a decree sustaining exceptions to the master's report. The opinion states the case.

Johns McCleave and George Shiras, Jr., for the appellant.

John H. Hampton and John Dalzell, for the appellee.

PAXSON, J. This case has drifted from its moorings. Originally, it was a bill filed in the court below by the Allegheny Valley Railroad Company against the Pittsburgh Junction Railroad Company, to prevent said company from taking, under the right of eminent domain, a portion of the property of the former company.

The plaintiff is a railroad corporation, owning and operating a line of railroad extending from Pittsburgh to Oil City, and, by means of various connections, to Buffalo, in the state of New York, and has owned and operated the said line for upwards of thirty years. The defendant is a railroad corporation, created and organized under the act of April 4, 1868, and its supplements. The plaintiff acquired the property in dispute long before the organization of the latter company, and uses it for the purposes of its yard. It is occupied with numerous tracks, coal-trestles, ice-house, round-house, and other buildings convenient and necessary for its business. The defendant is about constructing a railroad from its main line, at the foot of Thirty-sixth Street, in the city of Pittsburgh, extending along the left bank of the Allegheny River to a point at or near the mouth of Negley's Run, and also a like branch along the left bank of the Allegheny to a point at or near the foot of Eleventh Street, in said city. In pursuance of this object, it surveyed and located a route through the plaintiff's yard, cutting through the coal-yard, repair-yard, and about twenty-four feet of the coal-chute. Not being able to agree with the plaintiff, the defendant filed its bond in the court below, in accordance with the act of assembly. Whereupon, the plaintiff filed this bill to restrain defendant from further proceeding to lay its track upon the location in question. The court below granted a preliminary injunction, and, upon final hearing, made the injunction perpetual.

Upon the hearing before the master, the defendant abandoned its first location, and, without any action on the part of its board of directors, proceeded to relocate its road through plaintiff's yard, with a view to obviate some of the objections of the plaintiff, and lessen the injury and inconvenience to the business of the latter. The master proceeded to relocate the road in accordance with the plan submitted by the defendant. He held that such action was justified under the act of June 19, 1871, which provides that if, "in the judgment of such court, it is reasonably practicable to avoid a grade crossing, they shall, by their process, prevent a crossing at

grade." Upon exceptions to the master's report, the court below held that the act of 1871 had no application, for the reason that it referred to railroad crossings alone, while this was not a case of crossing at all in the proper sense of the term. In this, we think the learned judge was clearly right. The act of 1871 relates "to crossings of lines of railroads by other railroads." There was no attempt here to cross the line of plaintiff's road. It was an attempt to run through the plaintiff's yard, and the crossing of some of its yard-tracks and switches, which were merely incident to the use of its main line. As was well observed by the court below: "The attempt is not simply to cross the yard and tracks with a common use, but absolutely to take from plaintiff a portion of their yard for the sole use of the defendant. The issue is not, in what mode the defendant should cross plaintiff's property, but solely whether it can cross at all. The right of a railroad company to corporate rights being established or admitted, the right to cross, if necessary or convenient in reaching its terminus, is absolute, and the court can only ascertain the mode. But the court must inquire and ascertain whether unnecessary injury will be done by crossing in the manner proposed, and also whether a grade crossing can reasonably be avoided, and decree accordingly: *Pittsburgh etc. R. R. Co. v. Southwest Penn. R'y Co.*, 77 Pa. St. 173. No such issue was made in this case, and nothing suggested in the decree recommended by the master determines these questions."

We might well stop here and affirm this decree. We are in no doubt, however, as to the main question. While the franchises of a corporation are property, and may be taken under the power of eminent domain, yet when property has been already taken for one public use by a corporation, it cannot be taken by another corporation for another use, except by express grant or by necessary implication. The principle is well settled that "the lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as right of way by another railroad company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy": *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150; *Cake v. Philadelphia etc. R. R. Co.*, 87 Id. 307; *Housatonic R. R. Co. v. Lee etc. R. R. Co.*, 118 Mass. 391; *Boston etc. R. R. Co. v. Lowell R. R. Co.*, 124 Id. 368; *Prospect Park etc. R. R. Co. v. Williamson*, 91 N. Y. 552; *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359; *Central City Horse R'y Co.*

v. *Fort Clark R'y Co.*, 81 Ill. 523; *Hickok v. Hine*, 23 Ohio St. 523; 13 Am. Rep. 255. This rule is not confined to the track or right of way of the company, but also to the ground occupied by all the appliances necessary for the successful operation of the road: *Philadelphia etc. R. R. Co. v. Williams*, 54 Pa. St. 103; *Dublin etc. R'y Co. v. Navan R'y Co.*, 5 I. R. Eq. 393; *Prospect Park etc. R'y Co. v. Williamson*, *supra*; *St. Paul Union Depot Co. v. City of St. Paul*, *supra*. In *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325, it was said by Justice Agnew: "A power to build side-tracks is essential to the purpose and use of the road. A power to build a railroad of a single track, without the means of passing the trains, or of leaving the track for the shifting of cars, or of repairs at the shops and yards, and without standing-room for the cars not in motion, would be clearly wanting in all that is necessary to safety, convenience, and utility, and would be vain and nugatory": See also *Boston etc. R. R. Co. v. Lowell R. R. Co.*, *supra*.

It was urged, however, on the part of the defendant, that the yard of the plaintiff is larger than is necessary for its present use, and that it could be so rearranged as to accommodate defendant's tracks, and without serious detriment to the plaintiff, either in the present or the future. The evidence upon this point is conflicting, and we will not discuss it. The plaintiff contends that the arrangements of its yard cannot be changed without inconvenience and loss in the handling of its business, and that its area is not greater than will be required in the near future. We are of opinion that a railroad company has a right to consider the needs of the future, and to construct its road and make its plans with reference to those future needs. Upon this point, the language of McKennan, J., in *Lake Shore etc. R'y Co. v. New York etc. R'y Co.*, 8 Fed. Rep. 858, is sound and sensible: "Every reasonable intentment must be taken in favor of the primary rights of the complainant at the points of the alleged conflict. No actual encroachment upon these rights can be sanctioned or allowed, and in measuring their extent, there must be a liberal consideration for the future, as well as the existing necessities of the complainant, the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of all its business."

We are not embarrassed with the question that would arise if the defendant company could not build its road without laying its track through the plaintiff's yard. The location

claimed for defendant is a matter of economy, not of necessity. It can construct its road and reach its terminus by another route. It is true, it would be expensive; but it is a mere question of money and engineering skill. It is not entitled to run through the plaintiff's yard, and cripple its facilities for handling its business, merely to save money. Upon this point, the language of our brother Gordon, in *Pennsylvania Railroad Company's Appeal*, *supra*, is so clear and forcible that I may well repeat it here: "This plea of necessity is so frequently used to cover infractions of both public and private rights that, *prima facie*, it is suspicious, and must be closely scrutinized, especially when it is used to carry corporate privileges beyond charter limits. This plea, in the first place, must be tested by the rule, now of universal acceptation, that all acts of incorporation, and acts extending corporate privileges, are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken as withheld. This rule is to be taken in all its rigor when the attempt is so to construe a corporate grant as to interfere with a previous grant of the same kind: *Packer v. Sunbury etc. R. R.*, 19 Pa. St. 211. It is true that a franchise is property, and as such may be taken by a corporation having the right of eminent domain; but in favor of such right there can be no implication, unless it arises from a necessity so absolute that, without it, the grant itself would be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy. To permit a necessity such as this to be used as an excuse for the interference with or extinction of previously granted franchises would be to subject these important legislative grants to destruction on a mere pretense,—in fact, at the will of the holder of the latest franchise."

The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

EMINENT DOMAIN. — When private property has been once taken for specific public use, it should not be used for a foreign purpose without a new legal taking or the consent of the party from whom it was derived; but it may be applied to any new mode of user tending to the primary purpose: *Fulton v. Short Route etc. Co.*, 85 Ky. 640; 7 Am. St. Rep. 640; and see note to same for appropriation of highway for railway purposes.

EMINENT DOMAIN — PUBLIC PURPOSES, WHAT ARE: *Toledo etc. R'y Co. v. Railroad Co.*, 62 Mich. 564; 4 Am. St. Rep. 875, and note 884.

APPEAL OF SHARON RAILWAY COMPANY.

[122 PENNSYLVANIA STATE, 533.]

EMINENT DOMAIN—RAILROAD CROSSING TRACK OF ANOTHER—PENNSYLVANIA ACT OF 1871.—Railroad crossing, within the meaning of the Pennsylvania act of 1871, is such a crossing only as appropriates no part of the land of the company whose track is to be crossed to the exclusive use of the company seeking to cross; and therefore the equitable powers of the court of common pleas, as conferred by the second section of that act, cannot be invoked where the primary object of a railroad company is to appropriate the land of another company, the crossing of the tracks being a mere incident.

EMINENT DOMAIN—RIGHT OF ONE RAILROAD COMPANY TO TAKE LANDS OF ANOTHER.—To justify the taking by one railroad company, for the same use, under the right of eminent domain, of land acquired by another company, which is necessary for the latter to economically and expeditiously carry on its present and prospective business, there must be a necessity so absolute that, without it, the grant itself would be defeated, and not a necessity created by the company itself for its own convenience, or for the sake of economy.

BILL in equity by the Sharon Railway Company to restrain the Sharpsville Railroad Company from appropriating a portion of the complainant's land under the right of eminent domain. The complainant appealed from a decree declining to follow the recommendation of the master, and dissolving the preliminary injunction, and giving the defendant the right to construct its road across the complainant's tracks. The opinion states the case.

Thomas Tanner and Samuel Griffith, for the appellant.

A. F. Henlein and Johns McCleave, for the appellee.

PAXSON, J: This case is ruled by *Pittsburgh Junction Railroad Company's Appeal*, 122 Pa. St. 511, *ante*, p. 128. In that case the Junction Railroad Company sought to pass through the yard of the Allegheny Valley Railroad Company in the city of Pittsburgh, and in doing so, attempted to appropriate a strip of land twenty-four feet wide, between Forty-third and Forty-seventh streets. The case was referred to a master, and upon the hearing an attempt was made to change the location, upon the theory that it was a case of grade crossing. This was precisely what was done below in the case in hand.

The defendant, the Sharpsville Railroad Company, located a branch of its road through the yard of the Sharon railway, appellant, and filed its bond in the usual manner to secure the damages. The appellant then filed this bill in the court below to restrain the appellee from so appropriating its land.

When the case came on for a hearing the appellee had changed its location, but still passing through appellant's yard, and claimed the right to lay its track upon the line thus newly appropriated, and for which it had not given bond, with security, as required by the act of assembly. To meet this difficulty it was attempted to turn it into a case of grade crossing. That it is not a case of grade crossing is too plain for argument. It requires but a glance at the plans and exhibits to see that the primary object of the appellee was to appropriate appellant's land, and that the crossing was a mere incident. The equitable powers of the court of common pleas, as conferred by the second section of the act of June 19, 1871, in regard to railroad crossings, cannot be invoked in such a case as this. By a railroad crossing within that act is meant such a crossing only as appropriates no part of the land of the company whose track is to be crossed, to the exclusive use of the company seeking to cross. The question before the master and the court below was, whether the appellee had the right, for its own convenience and benefit, to appropriate a considerable portion of the yard of the appellant. It is true, the prayer for relief in the plaintiff's bill is in the alternative; that if the defendant cannot be restrained from constructing its road through plaintiff's yard, that the court may, by its decree, define the terms and conditions upon which said defendant may be permitted to cross. It is also true that the plaintiff offered evidence before the master that a line could be made that would do less injury to plaintiff than the route indicated. This, however, was in rebuttal of defendant's evidence tending to show that the route proposed was the only one reasonably practicable. Besides, the alternative prayer referred to a crossing merely, and not to an appropriation of its yard.

The land in question was acquired by the appellant company in entire good faith several years before this controversy commenced, for the purposes of a yard. I do not understand this fact to be disputed. It is true, the learned judge below was of opinion that portions of the tracks in this yard were not constructed until about the time this bill was filed, and that "the primary purpose in their construction was to obstruct the building of defendant's branch." We cannot adopt this finding in the sense in which the court below put it. The delay in building these tracks is accounted for by the poverty of the company. The master distinctly finds the fact that

the land was acquired by appellant in 1874-75, "for the purpose and with the intent of locating its distributing yard there for the accommodation of the business of its road and branches; and the land so acquired is conveniently located, well suited, and necessary to enable the plaintiff company to economically and expeditiously carry on its present and prospective business." Under such circumstances the precise time when its tracks in the yard were laid is not material.

We have, then, the finding of the master, based upon ample testimony, that the land in question was acquired by the appellant company for the uses of its road, and that the same is necessary therefor. Can it now be taken by another corporation for the same or a similar use? It certainly cannot be done for the mere convenience or profit of the latter. To justify such taking there must be a necessity; "a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be created by the company itself for its own convenience, or for the sake of economy": *Pennsylvania R. R. Co.'s Appeal* 93 Pa. St. 150. To the same effect is *Pittsburgh Junction R. R. Co.'s Appeal*, *supra*. I will not stop to discuss or vindicate this rule. It is settled law, and rests upon sound principles. The cases of *Appeal of Western Pennsylvania R. R. Co.*, 99 Id. 155, and *Northern Central R'y Co.'s Appeal*, 103 Id. 621, have no application. They were cases of grade crossings under the act of 1871.

If there is any absolute necessity for the appropriation of plaintiff's yard by the defendant company, it has not been shown. Certainly its failure to so appropriate it will not defeat its grant or the purpose for which it was chartered. The master finds: "We have already seen that the defendant company has constructed the railroad contemplated at the time its charter was obtained, from a point of connection with the plaintiff company in the borough of Sharpsville to Wilmington Junction, in Lawrence County. There is no necessity, therefore, to prevent a failure of its chartered purposes, that it should be allowed to take complainant's land. The only purpose it has in view in desiring to construct a branch to Sharon is that it may carry its own freight to and from the Sharon furnaces and the furnace of Boyce, Rawle, & Co., instead of receiving it from or turning it over to the plaintiff company as the case may be."

Granted that the defendant company has the power to build this branch, and that the same would be convenient, and even profitable, it cannot be said that its construction was the primary purpose for which it was chartered, or that its failure to do so will destroy its grant. The branch is but an incident to the main object of the company, and it cannot pursue the incident to the destruction of the rights of other parties. Land once appropriated by a railroad company to public use, under the right of eminent domain, cannot afterwards be appropriated by another company to the same use, excepting in a case of absolute necessity. Such necessity does not appear in this case.

The learned master says, near the conclusion of his report: "Under the facts, therefore, as they were developed in this case, and as they have been found, and the principles of law applicable thereto, the master is of the opinion that the defendant company cannot be allowed to construct its branch railroad through the plaintiff company's yard, as located, at grade, and would recommend a decree to that effect." Had the master stopped here, there would have been no room for criticism. But at this point he appears to have turned the case into one of grade crossing, and proceeds to locate defendant's road through plaintiff's yard, under the act of 1871, under the impression that plaintiff's bill, while denying the right of the defendant to construct its branch line as located through the land of the plaintiff, yet seems also to recognize a right in the defendant to construct said line, provided it can be done without materially interfering with plaintiff's franchises. We do not so understand the bill. The eighth paragraph thereof avers "that there is no engineering or other necessity for crossing complainant's railroad tracks as proposed by defendant, or for cutting into or in any manner interfering with the embankment or slopes of your orator's railroad hereinbefore complained of, but it is entirely practicable to avoid said yard and said grade crossings, and to avoid in any manner interfering with or trespassing on your orator's railroad or property."

I see nothing in the bill to sustain the view taken by the master upon this point. The alternate prayer for relief certainly cannot commit the plaintiff to this view, nor can the evidence offered by plaintiff to show that another location through its yard would do less damage than the one located be treated as a recognition of defendant's right to construct its road through plaintiff's yard. The true issue was, not whether

the defendant's route would do plaintiff the least injury, not whether the defendant could cross at grade or by an overhead track, but whether it had the right to appropriate plaintiff's land at all. This issue was lost sight of by the court below, and to some extent by the master.

The facts were accurately and carefully found by the master. The court below reversed him, but without materially interfering with his findings of facts. We see nothing in the case to lead us to doubt their accuracy. The master had the witnesses face to face before him; he, moreover, was upon the ground and examined it in connection with the plans with much care. Upon the facts as found by him, we are all of the opinion that the injunction should have been awarded.

The decree is reversed, at the costs of the appellee, and it is ordered that an injunction issue as prayed for in the plaintiff's bill.

CONDEMNATION OF PROPERTY OF CORPORATIONS UNDER POWER OF EMINENT DOMAIN — WHAT, IF ANY, PROPERTY MAY BE TAKEN.—It is a well-settled rule that the property of private corporations, including even their franchises, may be taken for public use, under the power of eminent domain, on making due compensation. The property of corporations stands upon the same footing in this regard as that of individuals, and their franchises are not distinguishable from their other property. While a charter is a contract between the state and the corporation, yet it is granted subject to the inherent condition that the privileges thereby conferred, and the property thereunder acquired, may be condemned by the state or its agents for public purposes, on payment of just compensation. The impairment or destruction of the franchises of a corporation, or the taking of its property under the exercise of this power, therefore, does not only not impair the obligation of a contract, but recognizes it to the fullest extent: *West River Bridge Co. v. Dix*, 6 How. 507; *Richmond etc. R. R. v. Louisa R. R.*, 13 Id. 71; *Greenwood v. Freight Co.*, 105 U. S. 13; *Alabama etc. R. R. v. Kenney*, 39 Ala. 307; *Enfield Toll Bridge Co. v. Hartford etc. R. R.*, 17 Conn. 40; 42 Am. Dec. 716; *Enfield Toll Bridge Co. v. Hartford etc. R. R.*, 17 Conn. 454; 44 Am. Dec. 556; *New York etc. R. R. v. Boston etc. R. R.*, 36 Conn. 196, 198; *Illinois etc. Canal v. Chicago etc. R. R.*, 14 Ill. 314; *Chicago etc. R. R. v. Town of Lake*, 71 Id. 333; *Metropolitan City R'y v. Chicago etc. R'y*, 87 Id. 317; *St. Louis etc. R. R. v. Springfield etc. R. R.*, 96 Id. 274; *Lake Shore etc. R'y v. Chicago etc. R. R.*, 97 Id. 506; *East St. Louis Connecting R'y v. East St. Louis Union R'y*, 108 Id. 265; *Lafayette Plank Road Co. v. New Albany etc. R. R.*, 13 Ind. 90; 74 Am. Dec. 246; *Crossley v. O'Brien*, 24 Ind. 325, 329; *Trustees of Belfast Academy v. Salmon*, 11 Me. 109; *State v. Noyes*, 47 Id. 189, 206; *Bellona Company's Case*, 3 Bland, 442; *Baltimore etc. Turnpike Co. v. Union R'y*, 35 Md. 224; 6 Am. Rep. 397; *Boston Water Power Co. v. Boston etc. R. R.*, 23 Pick. 360, 394; *Boston etc. R. R. v. Salem etc. R. R.*, 2 Gray, 1; *Central Bridge Corp. v. City of Lowell*, 4 Id. 474; *Proprietors of Locks and Canals v. City of Lowell*, 7 Id. 226; *Haverill Bridge Proprietors v. County Commissioners of Essex*, 103 Mass. 120; 4 Am. Rep. 518; *Eastern R. R. v. Boston etc. R. R.*, 111 Mass.

125; 15 Am. Rep. 13; *Toledo etc. R'y v. Detroit etc. R. R.*, 62 Mich. 564; 4 Am. St. Rep. 875; *Barber v. Andover*, 8 N. H. 398; *Peirce v. Somersworth*, 10 Id. 369; *Backus v. Lebanon*, 11 Id. 19; 35 Am. Dec. 466; *Northern R. R. v. Concord etc. R. R.*, 27 N. H. 183; *Crosby v. Hanover*, 36 Id. 404; *Black v. Delaware etc. Canal Co.*, 24 N. J. Eq. 455; *Matter of Kerr*, 42 Barb. 119; *Sixth Avenue R. R. v. Kerr*, 45 Id. 138; *Matter of New York Cent. etc. R. R. v. Metropolitan Gas Light Co.*, 63 N. Y. 326; *Sixth Avenue R. R. v. Kerr*, 72 Id. 330; *North Carolina etc. R. R. v. Carolina Cent. R'y*, 83 N. C. 489; *Kinsman Street R. R. v. Broadway etc. Street R. R.*, 36 Ohio St. 239; *Oregon Cascade R. R. v. Baily*, 3 Or. 164; *In re Towanda Bridge Co.*, 91 Pa. St. 216; *Philadelphia etc. Passenger R'y Co.'s Appeal*, 102 Id. 123; *Armington v. Town of Barnet*, 15 Vt. 745; 40 Am. Dec. 705; *White River Turnpike Co. v. Vermont Cent. R. R.*, 21 Vt. 590; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R.*, 11 Leigh, 42, 76; 36 Am. Dec. 374, 381; *James River etc. Co. v. Thompson*, 3 Gratt. 270.

In *Central Bridge Corp. v. City of Lowell*, *supra*, Bigelow, J., uses the following language concerning the subject in question: "Nor is the principle thus recognized any violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held, in a measure and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose, the legislature do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigences, although it may be necessary, in the exercise of such rights and privileges, to take and appropriate a franchise previously granted. If such were the rule, great public improvements, rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts, might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of policy, as well as of law, is, that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private right. The obligation of the contract created by the original charter is thereby recognized."

It will be observed that the foregoing general proposition is stated without regard to the fact whether or not the corporation is one which, like a railroad company, has assumed obligations towards the public, and the property of which may be said to be held for a public use; and furthermore, that it makes no distinction between the case of the state itself directly taking the property, as, for instance, through a municipal corporation for streets and highways, and the case of one corporation taking the property of another, by authority of the state, for public use. Such distinctions do not exist. Thus in *Eastern R. R. v. Boston etc. R. R.*, 111 Mass. 125, 130, 15 Am. Rep. 13, 18, the court, in holding that the legislature might authorize one railroad company to take for a passenger station land of another company, answers the objection: "It is said that the land in question has already been appropriated to a public use under the provisions of law, and that in the exercise of the right of eminent domain, the state cannot legally give to one railroad

corporation power to take from another the exclusive use of land to be devoted to incidentally the same public use, — that this would be to destroy vested rights and impair the contract contained in its charter. But it has often been declared by this court that there is no such limitation on the authority of the legislature." The legislature, then, may authorize one corporation to take the property of another for public use, although such property is already devoted to a public use by the latter corporation. Whether or not the legislature has really conferred the authority is another question. It is doubtful, however, whether the legislature would be warranted in authorizing the appropriation of property for a public use which is exactly the same in purpose and extent as the use to which it is already devoted. As, for example, to charter a corporation to erect and maintain a toll-bridge at a certain point, and empower it to condemn the toll-bridge and franchise of a previously existing company at the same place; or if a corporation is chartered to construct and operate a railroad between certain termini, to charter another company to maintain a railroad between the same termini, with power to appropriate the road of the first company. If the use were thus precisely the same, there could hardly be said to be a taking for public use: See *Boston Water Power Co. v. Boston etc. R. R.*, 23 Pick. 360, 393, per Shaw, C. J.; *Lake Shore etc. R'y v. Chicago etc. R. R.*, 97 Ill. 506. Yet it must not be supposed that in the instances given the existing bridge could not be taken for a free bridge, or a public highway laid out over it, or the first railroad be crossed, or a portion of it, or other property of the company be taken by the other company for the joint or exclusive use of the latter, or perhaps even the entire road be taken by a more extensive company, if the public interests justified it.

Nor is it material that the property sought to be condemned was itself acquired by the corporation under the power of eminent domain. It may nevertheless again be taken under the same power: *New York etc. R. R. v. Boston etc. R. R.*, 36 Conn. 196, 198; *Chicago etc. R. R. v. Town of Lake*, 71 Ill. 333; *North Carolina etc. R. R. v. Carolina Central R'y*, 83 N. C. 489; *Oregon Cascade R. R. v. Baily*, 3 Or. 164. "It will hardly be claimed," say the court in the first of these cases, "that the taking of property by the exercise of the right of eminent domain is an exhaustion of the right in respect to that property. Strictly speaking, there is no such thing as an extinction of the right of eminent domain. If the public good requires it, all kinds of property are alike subject to it, as well that which is held under it as that which is not." Nor, on the other hand, that the property was purchased instead of being acquired by regular condemnation proceedings: *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359. Nor does it make any difference that land desired to be appropriated was granted to the corporation by the state. Although the grant is irrevocable, the land is not exempt from the exercise of the power of eminent domain: *Boston Water Power Co. v. Boston etc. R. R.*, 23 Pick. 360, 394; *Boston etc. R. R. v. Salem etc. R. R.*, 2 Gray, 1, 36; *Illinois etc. Canal v. Chicago etc. R. R.*, 14 Ill. 314. Not even are lands granted by Congress to a corporation organized under its laws exempt from the exercise of the power by authority of a state, at all events to a limited extent: *Northern Pacific R. R. v. St. Paul etc. R'y*, 1 McCrary, 302; *Union Pacific R'y v. Burlington etc. R. R.*, 1 Id. 452; and land owned by the United States itself as a mere proprietor, and not used for any of the purposes of the national government, may be taken by a state for public use: *United States v. Railroad Bridge Co.*, 6 McLean, 517.

No property, therefore, of a corporation is exempt from this power. And

"property," says Shaw, C. J., in *Boston etc. R. R. v. Salem etc. R. R.*, 2 Gray, 1, 35, "is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments." With respect to the franchises, and other such rights of a corporation, while it is usually said that they may be "taken," it may be here noticed that they are, properly speaking, not taken, but impaired or destroyed: See *Pennsylvania Railroad Company's Appeal*, 93 Pa. St. 150, 162, per Paxson, J., dissenting. Of course the state, or a corporation to whom it has delegated the right, is not bound to take the entire estate, when exercising the power of eminent domain, but may take, and strictly should take, only such an interest as is necessary to be acquired to accomplish the public purpose in view: *Sixth Avenue R. R. v. Kerr*, 72 N. Y. 330; but it has been held that while perhaps one railroad company may condemn the entire road of another by a liberal construction of the eminent domain act of Illinois, one competing street-railroad company has no right to take for its joint use a part of the previously constructed railway of another company in successful operation, and thus render the fragments not so taken unproductive, and the franchise of the first company of but little value: *Central City Horse R'y v. Fort Clark Horse R'y*, 81 Ill. 523.

EFFECT OF CONFERRING EXCLUSIVE PRIVILEGES OR FRANCHISES. — But how is the right to exercise the power of eminent domain affected by an exclusive privilege or franchise conferred by the legislature upon a corporation? In the first place, it is settled that the mere grant to a corporation or an individual of the right to erect and maintain a toll-bridge, ferry, canal, turnpike, railroad, or other public convenience across a certain stream, or over a certain route, confers no exclusive franchise upon the grantee, in the absence of an express provision to the contrary; and, therefore, the legislature is under no constitutional obligation, however strong a moral one there may be, not to confer a similar privilege upon another corporation or individual, or to itself cause a free bridge, ferry, or highway to be constructed and opened, although by so doing the franchise first granted will be impaired or even destroyed. In the absence of an express limitation in the grant upon legislative action, none will be implied. Hence the subsequent grant for a similar purpose is not open to the objection of impairing the obligation of a contract, if it does not provide for compensation to the first grantee. No provision for compensation need be made, for there is no taking of property, and none can be recovered, unless, of course, property be otherwise really taken: *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420; *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. 296; 27 Am. Dec. 655; *Salem etc. Turnpike Co. v. Town of Lyme*, 18 Conn. 451; *Illinois etc. Canal v. Chicago etc. R. R.*, 14 Ill. 314; *East St. Louis Connecting R'y v. East St. Louis Union R'y*, 108 Ill. 265; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *Newcastle etc. R. R. v. Peru etc. R. R.*, 3 Id. 464; *Lafayette Plank Road Co. v. New Albany etc. R. R.*, 13 Id. 90; 74 Am. Dec. 246; *Richmond etc. Turnpike Road Co. v. Rogers*, 1 Duvall, 135; *Piatt v. Covington etc. Bridge Co.*, 8 Bush, 31; *State v. Noyes*, 47 Me. 189, 208; *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Mohawk Bridge Co. v. Utica etc. R. R.*, 6 Paige, 554; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547; *Matter of Hamilton Avenue*, 14 Barb. 405; *Troy etc. R. R. v. North Turnpike Co.*, 16 Id. 100; *New York etc. R. R. v. Forty-second Street etc. R. R.*, 50 Id. 285, 309; 26 How Pr. 68; 32 Id. 481; *White River Turnpike Co. v. Vermont Central R. R.*, 21 Vt. 590, 594; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R.*, 11 Leigh, 42; 36 Am. Dec. 374; *Hopkins v. Great Northern R'y*, L. R. 2 Q. B. D. 224; overruling *Reg. v. Cam-*

brian R'y, L. R. 6 Q. B. 422; compare *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 28.

If, however, the legislature should expressly confer an exclusive privilege upon the first corporation or individual, there is then a contract between the state and the grantee, the obligation of which cannot be impaired by subsequently conferring a franchise within its prohibitions upon another company or individual, without making provision for the impairing or destruction of the franchise previously granted: *Bridge Prop'rs v. Hoboken Co.*, 1 Wall. 116; *Binghamton Bridge Case*, 3 Id. 51; *State v. Noyes*, 47 Me. 198, 208; *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Raritan etc. R. R. v. Delaware etc. Canal Co.*, 18 N. J. Eq. 546; *Enfield Toll Bridge Co. v. Hartford etc. R. R.*, 17 Conn. 40; 42 Am. Dec. 716. But notwithstanding the grant of an exclusive right or privilege, it may be condemned for public use under the power of eminent domain, upon just compensation being made: *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 673; *Boston etc. R. R. v. Salem etc. R. R.*, 2 Gray, 1; *In re Twenty-second Street*, 102 Pa. St. 108; *Red River Bridge Co. v. Mayor etc. of Clarksville*, 1 Sneed, 176; 60 Am. Dec. 143; *Shorter v. Smith*, 9 Ga. 517; *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Backus v. Lebanon*, 11 Id. 19; 35 Am. Dec. 466; *Crosby v. Hanover*, 36 N. H. 404; *Enfield Toll Bridge Co. v. Hartford etc. R. R.*, 17 Conn. 40; 42 Am. Dec. 716; *Enfield Toll Bridge Co. v. Hartford etc. R. R.*, 17 Conn. 454; 44 Am. Dec. 556; *State v. Noyes*, 47 Me. 189, 208; *Metropolitan City R'y v. Chicago etc. R'y*, 87 Id. 317; *Village of Hyde Park v. Oakwood Cemetery Ass'n*, 119 Ill. 141. Exclusive rights must yield to public interest, and the obligation of the contract is not impaired, but is recognized by a provision for compensation.

Such a grant is, however, strictly construed; and therefore an exclusive franchise to construct and maintain a toll-bridge across a stream within certain limits is not violated by the erection of a bridge for railroad purposes within those limits, under legislative sanction, without a provision for compensation to the owners of the toll-bridge: *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Proprietors of Bridges v. Hoboken Land and Improvement Co.*, 13 N. J. Eq. 81, 503; *Thompson v. New York etc. R. R.*, 3 Sand. Ch. 625; *McRee v. Wilmington etc. R. R.*, 2 Jones, 186; *Lake v. Virginia etc. R. R.*, 7 Nev. 294; *contra*, *Enfield Toll Bridge Co. v. Hartford etc. R. R.*, 17 Conn. 40; 42 Am. Dec. 716. Or if the charter of a toll-bridge company prohibits the establishment of a ferry within a certain distance from the bridge, the building of a railroad bridge within that distance is plainly not an infringement of chartered rights: *Mohawk Bridge Co. v. Utica etc. R. R.*, 6 Paige, 554, 564; and if the legislature grants an exclusive right of ferry within certain limits, it may nevertheless undoubtedly lawfully grant the right to erect a toll-bridge within such limits without providing for compensation, if the *locus in quo* occupied by the ferry be not taken: *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

In the foregoing cases there is no "taking" of private property for public use without just compensation. But in many of the state constitutions which have been recently adopted the provision is much broader. Not only must private property be not *taken* for public use without just compensation, but it must not be *damaged*. Under such a constitutional provision, it has been held that where there was a grant of an exclusive privilege to maintain a ferry across a river, a toll-bridge could not be erected within the limits of the exclusion without compensation for the damage thereby sustained to the ferry: *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396. If the prior grant

had not been exclusive, the interesting question might have been presented, whether there was not still a "damaging" of property, for which compensation must be made by the subsequent conferring of a similar franchise upon a competing corporation or individual. The court, in this case, was of the opinion that there would not be, but the question is an open one, and one not free from difficulty. Should it be decided in the affirmative, it would produce a modification of the rule first given under this head.

HOW LEGISLATIVE INTENT MUST BE EXPRESSED. — The next inquiry is as to the way in which the legislature must express its intent that the property and franchises of a corporation may be taken under the power of eminent domain. It should be noticed, at the outset, that while the courts have the right to determine whether the use for which the property is proposed to be taken is public or not, yet when the use is public the necessity or propriety of exercising the power of eminent domain is a political question, which belongs exclusively to the legislature to determine, and with which the courts have nothing to do: *Chicago etc. R. R. v. Town of Lake*, 71 Ill. 333, 336; *Village of Hyde Park v. Oakwoods Cemetery Ass'n*, 119 Id. 141. Again, in the language of Chief Justice Shaw, in *Boston etc. R. R. v. Salem etc. R. R.*, 2 Gray, 1, 36: "It must appear that the government intend to exercise this high sovereign right by clear and express terms or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the act that they recognize the right of private property, and mean to respect it; and under our constitution, the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property for any use other than a public one, or fails to make provision for a compensation, the act is simply void; no right of taking as against the owner is conferred; and he has the same rights and remedies against a party acting under such authority as if it had not existed. In general, therefore, when any act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it, for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those thus affected."

The right to exercise the power of eminent domain must, then, be conferred by clear and express terms, or by necessary implication. And an implication does not arise except from the language of the legislative act, or from its being shown, by an application of the act to the subject-matter, to be a necessary condition to the beneficial enjoyment and efficient exercise of the powers expressly granted, and then only to the extent of the necessity: *Inhabitants of Springfield v. Connecticut River R. R.*, 4 Cush. 63; *Milwaukee etc. R'y v. City of Faribault*, 23 Minn. 167; *Matter of City of Buffalo*, 68 N. Y. 167; *Hickok v. Hine*, 23 Ohio St. 523; 13 Am. Rep. 255. "There can be no implication," says the supreme court of Pennsylvania, even, in speaking of the right of a railroad company to take, by implication, a portion of the road of a street railway, "unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy": *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150; *Appeal of Pittsburgh Junction R. R. Co.*, ante, p. 128. Authority given in general terms is, consequently, presumptively not sufficient to au-

thorize the taking, for an inconsistent use, of property already devoted to a public use, and necessary for the purpose to which it is devoted. This rule has been frequently applied where one private corporation, as a railroad company, seeks to condemn property of another in use for a public purpose: *Housatonic R. R. v. Lee etc. R. R.*, 118 Mass. 391; *Worcester etc. R. R. v. Railroad Comm'rs*, 118 Id. 561, 567; *Boston etc. R. R. v. Lowell etc. R. R.*, 124 Id. 368, 370; *Providence etc. R. R. v. Norwich etc. R. R.*, 138 Id. 277, 279; *Chesapeake etc. Canal Co. v. Baltimore etc. R. R.*, 4 Gill & J. 1; *Oregon Cascade R. R. v. Baily*, 3 Or. 164; *Lake Shore etc. R'y v. New York etc. R'y*, 8 Fed. Rep. 858; *Dublin etc. R'y v. Navan R'y*, 5 I. R. Eq. 393; and see *Contra Costa etc. R. R. v. Moss*, 23 Cal. 325; *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Id. 659; *Alexandria etc. R'y Co. v. Alexandria etc. R. R.*, 75 Va. 780; 40 Am. Rep. 743; and where a city, town, or county attempts to lay out streets or highways over the lands of a railroad or other private corporation which are devoted to a public use: *Milwaukee etc. R'y v. Faribault*, 23 Minn. 167; *St. Paul Union Depot Co. v. City of St. Paul*, 30 Id. 359; *New Jersey Southern R. R. v. Long Branch Comm'rs*, 39 N. J. L. 28; *City of Bridgeport v. New York etc. R. R.*, 36 Conn. 255; 4 Am. Rep. 63; *Evergreen Cemetery Ass'n v. City of New Haven*, 43 Conn. 234; 21 Am. Rep. 643; *West Boston Bridge v. County Commissioners of Middlesex*, 10 Pick. 270, 272; *City of Hannibal v. Hannibal etc. R. R.*, 49 Mo. 480; *Albany Northern R. R. v. Brownell*, 24 N. Y. 345; *Matter of City of Buffalo*, 68 Id. 167; *Prospect Park etc. R. R. v. Williamson*, 91 Id. 552; *Crosley v. O'Brien*, 24 Ind. 325, 329; or commissioners of drainage seek to excavate a ditch along the right of way of a railroad company: *Baltimore etc. R. R. v. North*, 103 Ind. 486; and the same rule is applicable to a railroad company claiming the right to lay out its road over a public street or highway: *Inhabitants of Springfield v. Connecticut River R. R.*, 4 Cush. 63; *Matter of Prospect Park etc. R. R.*, 67 N. Y. 371; *Commonwealth v. Erie etc. R. R.*, 27 Pa. St. 339; *Cleveland etc. R. R. v. Speer*, 56 Id. 325; *Cake v. Philadelphia etc. R. R.*, 87 Id. 307; a public park: *Matter of Boston and Albany R. R.*, 53 N. Y. 574; *Matter of New York etc. R'y*, 20 Hun, 201; a reservoir: *State v. Montclair R'y*, 35 N. J. L. 328; or grounds used and occupied by the state for an institution for the education of the blind: *St. Louis etc. R. R. v. Trustees of Blind Institution*, 43 Ill. 303; or where a water company seeks to take a public street for the purpose of a reservoir: *Ex parte Manhattan Co.*, 22 Wend. 653.

These foregoing rules were well stated by Folger, J., in *Matter of City of Buffalo*, 68 N. Y. 167, 175, as follows: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid, if the latter use, when exercised, must supersede the former, it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face

of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner."

A general power is, however, sufficient to authorize such an appropriation as will not essentially injure or interfere with the public use to which the property is devoted: *Boston Water Power Co. v. Boston etc. R. R.*, 23 Pick. 360; *Matter of Rochester Water Commissioners*, 66 N. Y. 413; *Baltimore etc. R. R. v. Pittsburg etc. R. R.*, 17 W. Va. 812, 852; *Philadelphia etc. R. R. v. City of Philadelphia*, 9 Phila. 563; compare *New York City etc. R. R. v. Central Union Tel. Co.*, 21 Hun, 261; and will consequently authorize one railroad company to cross the tracks of another: *Morris etc. R. R. v. Central R. R.*, 31 N. J. L. 205; *State v. Easton etc. R. R.*, 36 Id. 181, 187; *Pittsburg etc. R. R. v. Southwest Pennsylvania R'y*, 77 Pa. St. 173; *Appeal of Western Pennsylvania R. R. Co.*, 99 Id. 155; *Northern Central R'y Co.'s Appeal*, 103 Id. 621; or the line of a canal company: *Tuckahoe Canal Co. v. Tuckahoe etc. R. R.*, 11 Leigh, 42, 79; 36 Am. Dec. 374, 383; or a public street or highway: *Starr v. Camden etc. R. R.*, 24 N. J. L. 592, 594; *Inhabitants of Springfield v. Connecticut River R. R.*, 4 Cush. 63, 71; and will authorize a municipal corporation to lay out streets or highways across the tracks of a railroad company: *Little Miami etc. R. R. v. City of Dayton*, 23 Ohio St. 510; *New Jersey Southern R. R. v. Long Branch Comm'rs*, 39 N. J. L. 28, 32. And, for the same reason, lands of one railroad company, not in use, or not necessary for the exercise of its franchises or the discharge of its duties to the public, may be taken by another company under a general power: *North Carolina etc. R. R. v. Carolina Central R'y*, 83 N. C. 489; *New York etc. R. R. v. Boston etc. R. R.*, 36 Conn. 196; *Matter of New York etc. R'y*, 99 N. Y. 12; *Peoria P. & J. R. R. v. Peoria & S. R. R.*, 66 Ill. 174; and the right of a railroad company to hold property exempt from the exercise of the power of eminent domain cannot be extended by construction, as against a municipal corporation, to lands held by the company to uses and purposes for which it is not, by law, authorized to condemn private property: *Iron R. R. v. City of Thornton*, 19 Ohio St. 299; but, at the same time, a railroad company may claim as exempt under a general power, not only its track and right of way, but also the ground occupied by all the appliances necessary for the successful operation of the road, and the company may construct its road and make its plans with a liberal consideration of future as well as of existing necessities: *Appeal of Pittsburgh Junction R. R. Co.*, ante, p. 128.

DAMAGES WHICH MAY BE RECOVERED. — It should be borne in mind that the legislature may take public property for any particular use, or authorize it to be taken, without making any provision for compensation: *Indiana Cent. R'y v. State*, 3 Ind. 421. But the fact that a corporation, like a railroad or turnpike company, appropriates property to a public use does not make the property public, so that it may be condemned without making compensation: *Grand Rapids etc. R. R. v. Grand Rapids & I. R. R.*, 35 Mich. 265; 24 Am. Rep. 545; *Matter of Flatbush Avenue*, 1 Barb. 286; *Miller v. New York etc. R. R.*, 21 Id. 513; *Lake Shore etc. R'y v. Chicago etc. R. R.*, 97 Ill. 506. One railroad company cannot, therefore, even lay its road across the track of another railroad company, the canal of a canal company, or the road of a turnpike company, without compensating the latter for the damages thereby sustained: *Seneca Road Co. v. Albany etc. R. R.*, 5 Hill, 170; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R.*, 11 Leigh, 42, 79; 36 Am. Dec. 374, 383; although the latter have but an easement in the land: *Grand*

Junction R. R. v. County Commissioners of Middlesex, 14 Gray, 553; *Lake Shore etc. R'y v. Chicago etc. R. R.*, 100 Ill. 21; but see *Albany Northern R. R. v. Brownell*, 24 N. Y. 345; but it is held the grant of the right to a street-railroad company to lay down and operate its road through a public street does not exclude other such companies from crossing its track, without making compensation, so long as they do not thereby impede or interrupt the first company in operating its road: *Brooklyn Cent. etc. R. R. v. Brooklyn City R. R.*, 33 Barb. 420; although, of course, they could not have the same right to make use of its tracks: *Metropolitan R. R. v. Quincy R. R.*, 12 Allen, 262; *Jersey City & B. R. R. v. Jersey City & H. R. R.*, 20 N. J. Eq. 61. But if the legislature has reserved the power to alter, amend, and repeal the charter of a street-railroad corporation, it may lawfully authorize another company to use the tracks of the first, or to lay similar tracks through the same streets, making compensation for the use of the tracks of such company, but without compensation for the diminution of its profits or the value of its franchise: *Metropolitan R. R. v. Highland Street R'y*, 118 Mass. 290. On the same general principle, an act of the legislature authorizing telegraph companies to construct their lines upon the right of way of railroad companies is unconstitutional if it fails to provide any compulsory process for the enforcement of the payment of compensation for the property taken under its provisions: *Southwestern R. R. v. Southern etc. Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585. Even the reservation in an act incorporating a railroad company of the power to alter, modify, or repeal the act will not authorize the legislature to pass a statute requiring the company to cause a proposed new street or highway, laid out by the commissioners of highways, to be taken across its track, and to cause all necessary embankments, excavations, and other work to be done on its road for that purpose at its own expense: *Miller v. New York etc. R. R.*, 21 Barb. 513. In the construction of the work for which the property of one corporation is taken by another, reasonable care and skill must be exercised, or the condemning corporation will be responsible therefor: *Lafayette Plank Road Co. v. New Albany etc. R. R.*, 13 Ind. 90; 74 Am. Dec. 246; and see *Tuckahoe Canal Co. v. Tuckahoe etc. R. R.*, 11 Leigh, 42, 79; 36 Am. Dec. 374, 353.

So far as the assessment of damages is concerned, the same general principles are applicable to the case where the property of corporations is sought to be taken as in the case of individuals: See *Lake Shore etc. R'y v. Chicago etc. R. R.*, 100 Ill. 21, 31; *Chicago etc. R. R. v. Englewood Connecting R'y*, 115 Id. 375, 384; 56 Am. Rep. 173, 177. And in the assessment of damages for the taking of the property of one railroad company by another for a right of way, the amount of the damage must be shown, not necessarily with precision and accuracy, but approximately; and if damage is shown, but the amount is not approximately proved, no more than nominal damages can be allowed: *Peoria etc. R'y v. Peoria etc. R'y*, 105 Ill. 110. Direct and immediate damages are alone recoverable: *Peoria etc. R'y v. Peoria etc. R'y*, 105 Id. 110; *Chicago etc. R. R. v. Englewood Connecting R'y*, 115 Id. 375; 56 Am. Rep. 173, 176. For the property or interest therein actually appropriated, the corporation is, of course, entitled to compensation: *Old Colony etc. R. R. v. County of Plymouth*, 14 Gray, 155, 162; *Lake Shore etc. R'y v. Cincinnati etc. R'y*, 30 Ohio St. 604; although in *Central Bridge Corp. v. City of Lowell*, 15 Gray, 106, it was held that a bridge built by a corporation under a franchise to build it, and take tolls thereon for seventy years, or until the tolls should amount to a sum sufficient to reimburse the entire cost of building and maintaining the bridge, with nine per cent interest, becomes, upon the determi-

nation of the franchise, the property of the public, and therefore, upon the taking of the franchise for a public highway, the company was not entitled to compensation for the value of the bridge as a structure, but for the loss of the franchise only. If land has no market value, from the fact of its being used as a right of way for a railroad, and devoted to a special use of making railroad transfers, estimates of its value with reference to such use, by those competent to speak in that regard, should be received on the question of compensation to be paid for its condemnation for the use of another railroad company for its right of way: *Lake Shore etc. R'y v. Chicago etc. R. R.*, 100 Ill. 21.

In addition to such compensation, a railroad company, in case its track is crossed by another railroad company, or by a highway, is entitled to recover for the expense of erecting and keeping in repair fences, cattle-guards, and other structures made necessary by the crossing: *Old Colony etc. R. R. v. County of Plymouth*, 14 Gray, 155, 162; *Massachusetts Central R. R. v. Boston etc. R. R.*, 121 Mass. 124, 126; *Grand Rapids v. Grand Rapids etc. R. R.*, 58 Mich. 648; *Chicago etc. R'y v. Hough*, 61 Id. 507; *Chicago etc. R. R. v. Springfield etc. R. R.*, 67 Ill. 142; *St. Louis etc. R. R. v. Springfield etc. R. R.*, 96 Id. 274; and a statute requiring a railroad company, whose road is crossed, to pay any part of the expense of making the crossing, is unconstitutional; and a provision thereof requiring such company to bear some proportion of the expense of keeping the crossing in repair after it is made can only be justified by the necessities of the case growing out of the connection of the two tracks, and the extent of such expense should be limited, as near as may be, to what would have been necessary to keep the track in repair at the crossing had the same not been made: *Toledo etc. R'y v. Detroit etc. R. R.*, 62 Mich. 564; 4 Am. St. Rep. 875; but in a proceeding to condemn the right of way for a railroad across the right of way and tracks of another railroad, a stipulation or covenant executed by the petitioner, to the effect that it would, at its own expense, put in and maintain in proper repair the frogs and crossing across the tracks of the defendant, and that the stipulation should be binding on the successors and assigns of the petitioner so long as the grade crossing should be maintained, is a valid obligation, enforceable against the petitioner, its successors and assigns, and hence the cost of the proposed crossing could not become an element of damages in favor of the defendant, and evidence by the defendant on that subject should be excluded: *Chicago etc. R. R. v. Joliet etc. R'y*, 105 Ill. 388; although, notwithstanding such a stipulation, the defendant company has the right to show that the value of its road, and its capacity to do business, will be impaired by the proposed crossing: *Chicago etc. R. R. v. Englewood Connecting R'y*, 115 Id. 375; 56 Am. Rep. 173.

The increased danger arising from the crossing cannot, however, be considered as an element of damages, being too conjectural: *Peoria & P. Union R'y v. Peoria & F. R'y*, 105 Ill. 110; *Old Colony etc. R. R. v. County of Plymouth*, 14 Gray, 155, 162; *Boston etc. R. R. v. County of Middlesex*, 1 Allen, 324, 331; *Troy etc. R. R. v. North Turnpike Co.*, 16 Barb. 100; nor, it has been held, can it recover for the expense of maintaining a flagman at the crossing to guard against accidents: *Massachusetts Central R. R. v. Boston etc. R. R.*, 121 Mass. 124; *Lake Shore etc. R'y v. Cincinnati etc. R'y*, 30 Ohio St. 604; *contra*, *Old Colony etc. R. R. v. County of Plymouth*, 14 Gray, 155, 162; *St. Louis etc. R. R. v. Springfield etc. R. R.*, 96 Ill. 274; nor for the delay, inconvenience, and trouble in stopping at the crossing, in compliance with a statute, such a law being a mere police regulation, and subject to repeal at any time: *Peoria etc. R'y v. Peoria etc. R'y*, 105 Ill. 110; *Chicago etc. R. R.*

v. *Joliet etc. R'y*, 105 Id. 388; 44 Am. Rep. 799; *Lake Shore etc. R'y v. Cincinnati etc. R'y*, 30 Ohio St. 604; nor for the expense of ringing a bell, or the risk of being ordered by the county commissioners to provide additional safeguards at the crossing: *Old Colony etc. R. R. v. County of Plymouth*, 14 Gray, 155, 162; *Massachusetts Central R. R. v. Boston etc. R. R.*, 121 Mass. 124, 126.

The inconvenience and interruption in general of the business of a railroad company, caused by the taking of its property, has been held not to be a proper element of damages: *Boston etc. R. R. v. Old Colony R. R.*, 12 Cush. 605; 3 Allen, 142, 146; *Massachusetts etc. R. R. v. Boston etc. R. R.*, 121 Mass. 124, 126; but other cases hold that if the inconvenience or hindrance abridges the company's capacity to transact an equal volume of business, or increases the expense of the business transacted, it may then be considered: *Lake Shore etc. R'y v. Chicago etc. R. R.*, 100 Ill. 21; *Peoria etc. R'y v. Peoria etc. R'y*, 105 Id. 110, 118; *Chicago etc. R. R. v. Englewood Connecting R'y*, 115 Id. 375; 56 Am. Rep. 173, 176; and see *Toledo etc. R'y v. Detroit etc. R. R.*, 62 Mich. 564; 4 Am. St. Rep. 875.

On the other hand, the supposed or possible benefit which may accrue to a railroad company from a probable increase of business in consequence of the establishment of a new highway, which has been laid out across its road, are too remote, inconsiderable, and contingent to be taken into consideration in estimating the damages sustained by the company: *Old Colony etc. R. R. v. County of Plymouth*, 14 Gray, 155, 162; *Boston etc. R. R. v. County of Middlesex*, 1 Allen, 324.

In a proceeding by one railroad company to condemn a right of way over the property of another, the plans by which the first company proposes to build its road are admissible in evidence on the question of damages and compensation claimed: *Peoria etc. R'y v. Peoria etc. R'y*, 105 Ill. 110, and cases cited; *Chicago etc. R. R. v. Joliet etc. R'y*, 105 Id. 388, 394.

BALTIMORE AND OHIO EMPLOYEES' RELIEF ASSOCIATION v. POST.

[122 PENNSYLVANIA STATE, 579.]

EVIDENCE — DECLARATIONS OF AGENT. — Agent's authority cannot be shown by his own declarations; and in order that a party who avails himself of the act of an agent may give in evidence the agent's declarations to charge the principal, the burden of proof lies upon him to prove the authority under which the agent acted, and that the declarations were within its limits.

DECLARATIONS OF SERVANT DISTINGUISHED FROM THOSE OF AGENT. — Declarations of a servant are more jealously guarded as evidence against the principal than are those of an agent.

DECLARATIONS OF PAY-MASTER OF RAILROAD COMPANY. — Pay-master of a railroad company is a servant, and not an agent, of the company, he having no discretion, and his duties being purely ministerial, and therefore his loose declarations are not binding upon the company.

DECLARATIONS OF PAY-MASTER OF RAILROAD COMPANY AS TO DEDUCTION OF DUES FOR EMPLOYEES' RELIEF ASSOCIATION. — Declarations of a pay-master of a railroad company, that a deduction was made from an employee's wages for dues owed to an employee's relief association, are

inadmissible to establish the employee's membership in the association, the pay-master having no express authority to make the declarations, and not being authorized to make the deduction, although the constitution and by-laws of the association authorized the company to deduct dues from members, and not being an agent, officer, or servant of the association.

EMPLOYEES' RELIEF ASSOCIATION — MEMBERSHIP — DEDUCTION BY RAILROAD COMPANY OF DUES FROM WAGES OF EMPLOYEE. — Deduction by a railroad company of dues to an employees' relief association, from the wages of an employee, does not amount to an acceptance of the employee's application to become a member of the association, where the constitution and by-laws of the association authorized the company to deduct dues from members, but it does not appear that the company had been officially notified by the association that the employee had been admitted to membership.

ID. — TESTIMONY OF MEDICAL EXAMINER. — Testimony of the medical examiner of an employees' relief association is admissible, in an action to recover benefits, to show that the plaintiff had never been accepted as a member.

EMPLOYEES' RELIEF ASSOCIATION — EVIDENCE — WEEKLY BENEFITS — MORTALITY TABLES. — Mortality tables are not admissible in evidence on behalf of the plaintiff, in an action against an employees' relief association to recover weekly benefits accruing on account of his inability to labor.

EMPLOYEES' RELIEF ASSOCIATION — WEEKLY BENEFITS ACCRUING SUBSEQUENT TO COMMENCEMENT OF ACTION — ASSUMPSIT. — Plaintiff cannot recover any benefits accruing subsequent to the commencement of the action, in *assumpsit* for weekly benefits against an employees' relief association.

EMPLOYEES' RELIEF ASSOCIATION — BENEFITS — MEASURE OF DAMAGES. — Measure of damages in *assumpsit* for benefits against an employees' relief association is the sum stipulated to be paid under the charter and by-laws, and not such an amount as the jurors' consciences may approve as just.

EMPLOYEES' RELIEF ASSOCIATION — "TOTAL INABILITY TO LABOR." — Phrase "total inability to labor," contained in the constitution and by-laws of an employees' relief association, means a total inability to earn a livelihood at any employment, and not at the particular employment at which the member was engaged at the time of his injury.

ID. — EVIDENCE — RECEIPTS FOR BENEFITS. — Receipts of the plaintiff for benefits as a former member of an employees' relief association are inadmissible in an action against the association to recover benefits, for the purpose of showing by a clause therein the meaning of the phrase "total inability to labor," contained in the constitution and by-laws of the association, and that the plaintiff had knowledge of the practical construction placed upon the words.

ASSUMPSIT by William B. Post against the Baltimore and Ohio Employees' Relief Association, to recover weekly benefits as a member of the association. The plaintiff had a verdict and judgment, and the defendant brings error. The opinion states the case, with the exception of the assignments of error, which are as follows: 1. The admission of the declarations of

the pay-master of the Baltimore and Ohio Railroad Company that the dues of the plaintiff as a member of the defendant association had been deducted from his wages; 2 and 3. Instructions to the jury that the deduction by the railroad company of the plaintiff's dues amounted to an acceptance of his application to become a member of the defendant; 4 and 5. The rejection of the testimony of Dr. Doerner, the medical examiner of the defendant, to show that the plaintiff's application to become a member had never been accepted; 6. The admission of the mortality tables for the purpose of enabling the jury to ascertain the value of the benefits to which the plaintiff was entitled, it having been shown that the plaintiff was totally disabled from working at his trade; 7. Refusing to instruct the jury that, under the pleadings in the case, the plaintiff's action did not cover any demand for benefits accruing subsequent to the commencement of the suit; 8 and 11. Instructions that the words "total inability to labor," as used in the constitution and by-laws of the defendant, so as to entitle a member to benefits, meant total inability to earn a livelihood at such labor as the plaintiff was engaged in just before and at the time he was injured; 9 and 10. Instructions as to the measure of damages; and 12. The rejection of receipts for benefits, given by the plaintiff when a former member of the defendant, each of which contained the clause, "I declare on honor that during the period above stated I have not been able, by reason of said sickness, to perform my accustomed labor, and have not done work of any kind for pay," for the purpose of throwing light upon the construction and meaning of the provision in the defendant's constitution and by-laws, "total disability to labor," or "total inability to labor," and also to show that the plaintiff had knowledge of the regulation and of the course of dealing between the defendant and its members in regard to the practical construction placed upon the words.

James I. Brownson, Jr., and A. W. and M. C. Acheson, for the plaintiff in error.

H. M. Dougan, for the defendant in error.

PAXSON, J. The plaintiff below was in the employ of the Baltimore and Ohio Railroad Company, and whilst so employed received a personal injury by which he lost his left arm, and thereby was prevented from performing any manual

labor for a number of weeks. The defendant is a corporation chartered by the state of Maryland. In its act of incorporation its objects are stated to be "to extend relief in case of sickness, injury, old age, and death, to the employees of the Baltimore and Ohio Railroad Company, and their families, and also to the employees of such other railroad companies as this association may permit to participate in its benefits, and to the families of such employees; to receive deposits on interest from said employees and their wives, and to loan them money at lawful rates of interest, in order to provide them with or to improve homesteads, and generally to promote their welfare." The members of the association are divided into several classes, and graded as respects their benefits. The details are not important.

The plaintiff claimed that he was a member of the defendant company at the time he was injured, and entitled to the benefits provided by its charter and by-laws. The defendant denies that he was a member, and that he had ever paid anything in the way of dues or assessments. The plaintiff then brought this action of *assumpsit* to recover "the amount of the benefits to which he became entitled upon the payment of the assessment as aforesaid." It will thus be seen that the matter of his membership was a vital question in the plaintiff's case. The by-laws provide that "Employees are entitled to the benefits of the association only from the date of perfecting their applications for membership."

Upon the trial below, the plaintiff produced no certificate of membership, nor any written evidence of any kind showing that he was a member of the association. He testified that he had signed an application to be admitted as a member, but he had never been notified of his admission; nor had he ever been examined by the company's physician, or taken any of the steps required by the rules regarding admission. He further testified, under objection, that when he came to receive his monthly pay for January, 1883, the pay-master of the railroad company informed him that his dues to the defendant company had been deducted. Samuel Mackey, a witness for plaintiff, also testified that he was present, and heard the above statement by the pay-master. This was all the evidence in the case to show that plaintiff was a member of the company, and upon this he was allowed to recover and hold a verdict for \$3,541.

The admission of the declarations of the pay-master forms

the subject of the first assignment of error. I quote the language of the assignment:—

The court erred in overruling the defendant's objection to and admitting the following offer of evidence made by the plaintiff below.

(William B. Post, the plaintiff, on the stand; witness had just stated that when he was paid his wages for January, 1883, by the pay-master of the Baltimore and Ohio Railroad Company, there was a shortage in the amount received by him.)

Q. Did you ask for an explanation at the time that this payment was made to you?

The purpose is to show that at the time the plaintiff was paid his wages for the month of January, 1883, there was deducted from those wages an amount of money which the pay-master said was deducted by reason of the plaintiff's membership in the defendant association.

This was objected to, the objection was overruled, and a bill sealed. The witness then proceeded.

Q. What explanation was given, if any? A. The pay-master told me that the reason my pay was short was because the insurance money was deducted from it.

This declaration was received, and allowed to go to the jury as proof of the fact of plaintiff's membership. Moreover, it was the only proof in the case.

I may observe just here, in passing, that in point of fact there was no deduction from his wages on account of dues to the association. If the fact depended on oral testimony I would not state it in this positive manner. The pay-roll itself was produced upon the trial in the court below, and showed upon its face that no such deduction had been made, but that on the contrary it arose from a discrepancy in regard to time, the plaintiff claiming he had made more time than the company's time-book showed. There was also proof uncontradicted, that plaintiff's application had never been acted upon, and that he had never been admitted to membership. The admission of the pay-master's declarations, however, must be considered in view of the case as it stood at the time they were offered.

There was no proof produced by the plaintiff at any stage of the cause that the pay-master had any authority to make such a declaration, or that he was authorized to make any deduction from plaintiff's wages on account of dues to the

defendant company, or that he was an agent, officer, or even a servant of the company. He was merely the servant of the Baltimore and Ohio Railroad Company, another and distinct corporation. The latter company had no power to admit a man to membership in the defendant corporation, yet what the railroad company could not do, one of its employees has practically done, and that by a mere loose declaration, which, if made by him, he had no authority to make, and which bound no one but himself. Such a result can only come from an error somewhere. That it has its source in the erroneous admission of the pay-master's declarations, is very plain to our view.

It is true, the plaintiff put in evidence, subsequent to the ruling of the court upon this question, the constitution and by-laws of the defendant company. It is there provided that "all the contributions due by the members of this society shall be paid in advance, by being deducted from the monthly wages due them by either of the companies aforesaid, and every person signing these rules hereby assents to such reduction." From this, it was argued that the railroad company had the right to deduct the dues from the plaintiff's wages, that the pay-master was the company's agent for that purpose, and that his declarations while in the performance of that duty were competent evidence of the fact of such deduction. The whole of this proposition is unsound. In the first place, the railroad company could only deduct dues from members. This could only be done after being officially notified by defendant company that the employee had been admitted to membership. Without such notice, a deduction of dues from one of its employees would have been merely an unlawful act, which would bind no one but itself. In the second place, the fact, if it be so, that the railroad company was the agent of the defendant company to collect the dues from the employees of the former, does not constitute the pay-master its agent for any purpose, much less to bind it by his declarations. Considering, for the sake of the argument, that he was an agent of the railroad company, and that his declarations might bind his employer, it by no means follows that they would bind another corporation, which had never employed him, and probably did not know of his existence. But the declarations in question would not have bound the railroad company, for the reason that he had no authority to make them, nor were they properly in the course of his employment.

No more dangerous kind of evidence exists than this, and no case could more fully illustrate its danger than the one in hand.

The uncontradicted evidence showed that the pay-master had nothing to do with deductions for dues; that he did not handle the amount of such deductions; the money, therefore, did not pass through his hands; that whatever deductions were made from the pay-rolls were made by other officers; that he had nothing to do with the *data* from which the pay-roll was made up, or the method of reaching that result; that when the pay-rolls were made up by the proper officers, and sent to him, his duty, and his only duty, was to pay the men the balance due thereon. So that the declaration of this pay-master was as to what some one else had done at some other time and some other place.

As the railroad company was only an agent for a specific purpose, it could only bind its principal, the defendant company, by an act done within the scope of its authority. Its authority only extended to the single act of collecting dues from the members of the association. If it collected dues from a stranger, without any notification from the association that he was a member, it might bind itself, but it could not thereby bind the association, force upon it a member which it had not accepted, and render it liable to him for benefits. Authority must be shown to make the collection, or a subsequent ratification of the unauthorized act: *Twelfth Street Market Co. v. Jackson*, 102 Pa. St. 269; *Kerns v. Piper*, 4 Watts, 222; *Hackney v. Allegheny County Ins. Co.*, 4 Pa. St. 185; *Reaney v. Culbertson*, 21 Id. 507; *Greene v. Lycoming Fire Ins. Co.*, 91 Id. 387. Neither authority nor ratification is to be found within the four corners of this record. An agent's authority cannot be shown by his own declarations: *Grim v. Bonnell*, 78 Id. 152; *Whiting v. Lake*, 91 Id. 349. A party who avails himself of the act of an agent must, in order to give in evidence his declarations to charge his principal, prove the authority under which the agent acted. The burden of proof lies on him to establish the agency, and the extent of it: *Hays v. Lynn*, 7 Watts, 525; *American Life Insurance and Trust Co. v. Shultz*, 82 Pa. St. 46.

But the pay-master was not even the agent of the railroad company; he was a mere servant. The distinction between these classes of employees is sometimes lost sight of, and when it is, injustice is likely to follow. The distinction is well

stated by Dr. Wharton in his book on evidence: "We must remember that a servant moves within a limited orbit, one far more limited than that of an agent; and that consequently the admissions of a servant are more jealously guarded than are those of an agent. An agent is authorized to exercise discretion; when a servant is authorized to exercise discretion, then he ceases to be a servant, and becomes an agent. Those dealing with a mere servant, knowing him to be such, know that, except in the immediate discharge of a mechanical duty, he is not authorized to bind his master by his admissions. Hence, ordinarily, a master, except within such range, is not so bound": 2 Wharton on Evidence, sec. 1182. The paymaster in this case was clothed with no discretion. He was a mere servant to perform a purely ministerial duty, viz., to pay the men the amount respectively appearing to be due them from the railroad company by the monthly pay-rolls sent to him for that purpose. He had no authority to withhold any portion, for any purpose, of the amount designated in the pay-roll. Having no discretion, no duties to perform that were not ministerial, he cannot be said to be the agent of the company in any proper sense. He was an employee, with certain defined duties, just as are the brakemen, switch-tenders, engineers, firemen, and the thousands of other employees who are always to be found in the service of a great railroad company. To dignify such employments by the name of agents would not only be grotesque, but a serious innovation in the law as it has always been understood. And if we go further and hold the employer responsible for all the loose declarations of this army of servants, it is not difficult to see endless confusion and injustice as the result. In *Fairlie v. Hastings*, 10 Ves. 126, it was said by Sir William Grant, in discussing this subject: "An agent may undoubtedly within the scope of his authority bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements may be the foundation of or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make the statement or representation. So with regard to acts done, the words with which these acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But, except in the one or the other of those ways, I do not

know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. . . . If any fact material to the interests of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."

In the case in hand the fact to be proved was that the railroad company had deducted plaintiff's dues from his January pay. No attempt to prove this in a legitimate way was made. The pay-master was a competent witness, and if he had knowledge of the matter, could have been called and sworn. Instead of doing so, the plaintiff was allowed to prove his declarations, not as to anything he had done, but what some other persons had done some time before. The danger of admitting such loose declarations is shown by the fact found by the jury, that the dues have been deducted, in the face of clear, uncontradicted evidence to the contrary.

What an agent says in the course of his employment, and within his authority, is evidence against his employer, because it thus becomes the act of the principal. Thus if A is the agent of B to make a contract for the latter, what A says in regard to the contract at the time it is being made is a part of the contract; it is the equivalent of the sayings or acknowledgments of the principal. They may be explanatory of the agreement, or determine the quality of the act which they accompany, and therefore must be binding on the principal as the act or agreement itself. The declarations or admissions of an agent in such cases are admissible, not for the purpose of establishing the truth of the facts stated, but as representations by which the principal is as much bound as if he made them himself, and which are equally binding, whether the fact be true or false: Phillips on Evidence, 73; *Hannay v. Stewart*, 6 Watts, 487; and where a principal is bound for the acts or declarations of his agent, it is generally for the reason that said acts or declarations have led up or been the inducement to, or explain, or qualify, or form part of, some contract, or have caused some act to be done upon the faith thereof.

It has been seen that the declarations of the pay-master related to a past occurrence over which he had no control. In *Fawcett v. Bigley*, 59 Pa. St. 411, the defendant's barges broke from their moorings, ran into the plaintiff's barges, and destroyed one of them and its cargo. Declarations of the agent

of the defendant who had charge of his barges, made within an hour after the accident, could not be given in evidence to charge the defendant. To the same point are *Pennsylvania R. R. Co. v. Books*, 57 Id. 339; *Patton v. Minesinger*, 25 Id. 393; *Bigley v. Williams*, 80 Id. 107. Nor is the declaration of an existing fact by an agent necessarily admissible. It depends upon its circumstances to make it so. It must be strictly within the line of the authority of the agent: *Hanover Water Co. v. Ashland Iron Co.*, 84 Id. 279; *Fairlie v. Hastings*, *supra*.

We need not pursue this branch of the case further. We are clearly of the opinion that it was error to admit the declarations of the pay-master. This disposes of the first assignment of error. The second and third are also sustained. Aside from the declarations referred to, there was nothing to sustain these portions of the charge of the learned judge. We think the evidence of Dr. Doerner should have been received. (See fourth and fifth assignments.) He was the medical examiner of the defendant company, and the evidence was offered by the latter, as links in the chain, to show that plaintiff had never become a member of the association. When such loose declarations had been admitted to prove his membership, surely the defendant company had the right to show that he had never been examined by the medical officer, as required by the rules, and that he had never been accepted as a member. It was also error to admit in evidence the Combined Experience Mortality Tables. (Sixth assignment.) The plaintiff was suing for weekly benefits, and the mortality tables had nothing to do with the case. We also sustain the seventh assignment. The court was asked to instruct the jury that "under the pleadings in the case, the plaintiff's action does not cover any demand for any benefits accruing subsequent to the commencement of the suit." This was refused. The *narr.* was in *assumpsit* for the benefits, and only such could be recovered in this action as were due at the time the writ issued. In this connection, we may refer to the question of the measure of damages. The learned judge charged the jury that "there is no fixed rule by which damages can be ascertained in a case of this kind. You will carefully consider this question, and do that which your consciences will approve of as an act of justice to both parties, and then neither will have a right to complain." This was clearly error, as it left the jury no standard save their own consciences, which is too uncertain for practical purposes. As the plaintiff sued for

his benefits, it is clear the measure of damages would be the stipulated sum he was entitled to under the charter and by-laws of the company, provided his membership was established.

The declaration was not for the refusal of the company to admit him to membership, but, as before stated, to recover his benefits as a member, and the breach was a mere refusal to pay them. If this verdict is allowed to stand, I see nothing to prevent a recovery for benefits accruing subsequent to the commencement of the action. We also think the court below erred in its construction of the words "total inability to labor," contained in the constitution and by-laws. This was a relief association, not an accident insurance company. Its object was to relieve its members during the time when they were unable to work by reason of injury or sickness. Hence, if a member was injured in such a way that he could no longer earn a livelihood at the particular labor in which he was employed at the time of the accident, yet was capable of earning as much or more money in some other employment, it was certainly not the object of the association, as expressed by its charter and by-laws, that he should remain idle, and draw benefits all his life. The evidence shows that the plaintiff was taken back into the employ of the railroad company about two months after his injury, and was so retained until after a second discharge,—the first of which was, according to his own testimony, for drunkenness, and the second for inattention to his duties. The twelfth assignment is not sustained.

Judgment reversed.

AGENCY. — No one has right to rely on statements of agent concerning his own agency: *Bond v. Pontiac etc. R. R. Co.*, 62 Mich. 643; 4 Am. St. Rep. 885, and note 891; *Colman v. Colgate*, 69 Tex. 88.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

MENK v. HOME INSURANCE COMPANY.

[76 CALIFORNIA, 51.]

INSURANCE. — CLAIM THAT BUILDING WAS WARRANTED TO BE OCCUPIED BY THE ASSURED AND HIS FAMILY cannot be sustained when his answer to the question contained in the application, "Each story, how occupied?" is this: "Second story, by tenant as a lodging-house."

INSURANCE. — WHERE AGENT OF THE INSURER MAKES OUT THE APPLICATION, HAVING KNOWLEDGE OF THE FACTS, the company cannot urge in defense of an action for losses suffered that the statements contained in such application are defective or false.

INSURANCE. — CONDITIONS OF A POLICY MUST BE TREATED AS WAIVED, WHICH, TO THE KNOWLEDGE OF THE AGENT, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud.

INSURANCE — CONSTRUCTION OF POLICY. — Where the application is for insurance on a frame building and cellar, and is referred to in the policy in aid of the description, the omission from the policy of the words "the cellar" is immaterial; and the assured, in the event of a loss, is entitled to recover for the same property as though these words had been copied into the policy.

INSURANCE. — EVIDENCE OF THE DESTRUCTION OF PROPERTY OTHER THAN THAT INSURED may be received on behalf of plaintiff, when the insurance company makes the defense that he had burned his own property.

REVERSAL WILL NOT BE ORDERED ON ACCOUNT OF THE ADMISSION OF IMMATERIAL EVIDENCE, where it does not appear that the jury acted upon it to the prejudice of the appellant.

PRACTICE. — THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN ANY PARTICULAR FINDING cannot be questioned under a general specification that "there was no evidence which proved or tended to prove that the plaintiff at any time complied with or performed all the conditions or any of the conditions of the contract of insurance by him to be performed."

Olney and Byrne, A. B. Dibble, Van Ness and Roche, and Byrne and Cross, for the appellant.

Gaylord and Searls, for the respondent.

The COURT. This cause was heard and determined in department. A rehearing was granted, and it comes before us again.

Upon further examination, we adhere to the former opinion filed, and the judgment and order appealed from are affirmed, for the reasons given in the opinion of department one, filed August 30, 1887.

The following is the opinion above referred to:—

TEMPLE, J. Suit was brought upon a policy of insurance issued by the defendant; and from the judgment rendered in the action against the defendant, and from an order denying defendant's motion for a new trial, this appeal is taken.

The application and survey were expressly referred to and made part of the policy, and it was further stipulated that such application and survey should be considered a part of the contract and a warranty by the assured, and that any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known any fact material to the risk, or any over-valuation, should render the policy void.

Among other defenses, it was claimed that there was an over-valuation of the property and a misrepresentation as to its value; that a portion of the premises was occupied by a tenant as a saloon for the sale of liquors, which fact was not mentioned in the application, which stated as to the occupancy of the premises: "First story by applicant as a brewery; the second story as a lodging-house, and family residence in the rear."

It was also claimed on the trial, although there was no special plea of such defense, that the application contained a warranty in the above-quoted language that the applicant resided with his family on the premises, whereas, in fact, he did not reside there, but the premises were occupied by a tenant. In addition to the above language bearing upon this last point, the application in reply to the question, "Each story, how occupied?" has this: "Second story, by tenant as a lodging-house." It is plain that there is no representation that the applicant personally resided there. The rear was occupied as a residence by the tenant who had the lodging-house.

On the trial the plaintiff was permitted to testify, against the objection and exception of the defendant, that the application was in fact made out by an agent of defendant by the name of Burckhalter, and that the plaintiff did not know what representations it contained; and further, that the agent knew all about the premises, and the manner in which they were occupied, and their value. There was other testimony to the same effect. It is claimed that this was error, and the case of *Menk v. Commercial Insurance Company of California*, 70 Cal. 585, is relied upon as authority.

That was a case by the same plaintiff to recover for the same loss, the property being insured in the two companies at the same time, Burckhalter being the agent for both companies.

Counsel assert that the language of the two complaints is practically identical. In that case this court said in effect that the complaint alleged that the policy was issued upon an application made and signed by the plaintiff, and that such testimony was in contradiction of the complaint, and should have been ruled out. The language of that complaint is not before us, except in the statements quoted from the opinion. In this case the allegation is simply, "A copy of the application of plaintiff for said insurance, referred to in said policy, is also hereto annexed." Obviously this is not an allegation that the application was made out by the plaintiff. Of course, whoever made it out, it was the application of the plaintiff, and was signed by him or his agent. The only point in the offered testimony was, that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company; nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy.

The tendency of the decisions is plainly to hold all those conditions waived, which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud: *Kruger v. Western Fire and Marine Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42. This consideration

answers several points made by the defendant, which need not be further referred to.

It is claimed that the plaintiff was allowed, against the objection of defendant, to prove, in making out his loss, the value of property not insured. The application describes the property as follows: "Viz., \$2,000 on his two-story frame building and cellar, value \$6,700; the first story occupied as a brewery, the second story as a lodging-house, and family residence in rear; \$400 on his brewery apparatus, such as kettle, beer-kegs, tubs, faucets, cooler, and tools, value \$1,400; \$100 on his household furniture contained therein, value \$300; situate north side Front Street, Truckee, Nevada County, California."

In the policy the property is described thus: "Viz., \$2,000 on his two-story frame building occupied as a brewery, lodging-house, and family residence in rear, situate north side Front Street, Truckee, Nevada County, California; \$400 on his brewery apparatus, and \$100 on his household furniture contained therein; \$2,500 other concurrent insurance permitted, reference being had to application and survey No. 88038, on file in this office, which is made a part thereof."

The words "and cellar" are omitted in the policy. The amount of insurance, two thousand dollars, was asked upon the frame building and cellar, which were together valued at six thousand seven hundred dollars. No separate valuation was placed upon the frame building, nor was any insurance asked upon it as a separate property. The cellar was inclosed by the frame building, and probably when he came to write the policy, the agent concluded that the two constituted one building. The cellar was in the rear portion of the frame building, and "was a stone building, having its floor somewhat lower than that of the frame building, and rising thirteen or fourteen feet above the level at that floor, but not as high as the ceiling by about five feet. 'It was made of rocks; walls two feet thick. Had iron doors. Covered on top with bricks, and fourteen inches of dirt.'"

The application was expressly referred to in aid of the description. There can be no doubt that the cellar was included in the policy.

We are unable to discover any error in the admission of evidence in regard to the personal property. Read in connection with the application, it seems plain that the articles for which the recovery was had were included in the policy.

We see no injury to the defendant in the fact that the plaintiff was allowed to testify as to the loss of other property beside that which was insured. It was a part of the statement as to what was burned, and then it had a bearing upon the issue tendered by the defense, that plaintiff had burned his own property.

The plaintiff was allowed to read in evidence his affidavit, which was prepared soon after the fire, to make proof of loss. The effect of the paper as evidence was expressly limited by the court to showing that he had made the affidavit. The most that can be said about it is, that the evidence was immaterial. In the face of the fact that the plaintiff had been on the stand, and had testified fully as to the facts within his knowledge, we will not presume that the jury could have disregarded the positive injunctions of the court. We do not think that the error, if it were error, could have prejudiced the rights of the defendant. It does not appear that the affidavit was ever sent to the defendant, and if it had been, and the defendant set up as a defense the alleged breach of the contract in making the statement charged to be false, we see no materiality in it.

The evidence offered to show that liquor had been sold to Indians, admitting its materiality, was clearly incompetent.

The defendant is not in a position to make the point that, by the terms of the contract, if the parties could not agree upon the amount of loss, it should be referred to arbitration. Waiving the question as to whether it should have been pleaded, there is no specification in the statement on motion for a new trial of insufficiency of the evidence, under which it could be raised. A general statement that there was no evidence which proved or tended to prove that the plaintiff at any time complied with or performed all the conditions or any of the conditions of the contract of insurance, by him to be performed, would not be sufficient.

Judgment and order affirmed.

INSURANCE — COMPANY BOUND BY ACTS OF ITS AGENT. — Company is estopped from denying truth of false statements written in blanks in printed forms of application by its agent without knowledge of insured, although insured signed application, and agent, having been truthfully informed of the condition of the premises, issued the policy: *Continental etc. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 557, and note 565; *Western etc. v. Rector*, 85 Ky. 294; *Dunbar v. Phoenix etc.*, 72 Wis. 492. Where an agent delivers policy of insurance which acknowledges on its face that the premium has been paid, such acknowledgment concludes the company from subsequently assailing the

policy on account of failure to pay premium, unless the same was procured by fraud or through a mistake: *Home etc. v. Gilman's Ex'r*, 112 Ind. 7. Company is chargeable with mistakes of agents in filling up applications: *Insurance Co. v. Williams*, 39 Ohio St. 584; 48 Am. Rep. 474; *Combs v. Hannibal etc. Co.*, 43 Mo. 148; 97 Am. Dec. 383. Company is bound by acts of its agent: *Müller v. Phoenix etc.*, 27 Iowa, 203; 1 Am. Rep. 262. Policy is not invalidated because of misstatements therein of material facts, when filled out, issued, and renewed by its agent, after his personal inspection of the premises, unless there is fraud on the part of insured: *Beal v. Park etc. Co.*, 16 Wis. 241; 82 Am. Dec. 719. Company must bear loss sustained by misconduct or disobedience of its agent acting within scope of his authority, rather than the insured, who has dealt fairly with him without notice: *Commercial etc. Co. v. State*, 113 Ind. 331.

INSURANCE — WAIVER OF CONDITIONS. — General agent may waive condition inserted in policy issued by the company. Condition is waived by issuance of a policy by a general agent who knows of and assents to facts which constitute a breach of such condition. Waiver of breach of condition at the issuance of policy continues in favor of all renewals of such policy: *Kruger v. Western etc. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42, and note 45. Conditions are deemed waived as to misstatements of encumbrances, where company through its agent had knowledge at the time of the application of the fact that property was encumbered: *Wilson v. Minnesota etc. Ass'n*, 36 Minn. 112; 1 Am. St. Rep. 659, and note 660. To the same effect as to waiver of forfeiture of policy is *Oshkosh etc. v. Germania etc. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233, and note 236. Agent authorized to deliver policies and receive payment may waive the payment of the premium in cash, notwithstanding a stipulation in policy to the contrary: *Home etc. v. Gilman's Ex'r*, 112 Ind. 7. A provision in a policy requiring assured in case of loss to give notice immediately to insurer, and produce certificate of preliminary proof from a notary or magistrate, is waived, if insurer, after learning of loss, makes no objection to want of notice and preliminary proof, but joins in proceedings for determining loss by arbitration; and this is true, although policy contains provision "that no condition thereof shall be altered, waived, etc., except by written indorsement of president," etc.: *Carroll v. Girard etc. Co.*, 72 Cal. 297. It is settled that any condition of a contract of insurance may be waived by parol by the company: *King v. Council Bluffs etc.*, 72 Iowa, 310. Plaintiff relying upon waiver by company of conditions in a policy must plead such waiver: *Eiseman v. Hawkeye etc.*, 74 Iowa, 11. Clause in a policy denying insured's right to claim "a waiver by reason of any acts of any agent, unless such waiver is specially authorized in writing over signature of the president," etc., does not extend to stipulations of conditions to be performed after loss occurs, such as giving notice, furnishing proof, etc.: *Traveler's etc. Co. v. Harney*, 82 Va. 949.

COX v. McLAUGHLIN.

[76 CALIFORNIA, 60.]

AMENDMENT CHANGING CAUSE OF ACTION. — It is not an abuse of discretion for the court to permit an amendment counting upon a *quantum meruit*, when the original complaint sought to recover according to the terms of a contract, and the facts stated in both complaints are substantially identical.

FRAUDULENT CONTRACT. — A contractor is not precluded from recovering upon his contract to do certain work in the construction of a railway, by the fact that he entered into an agreement with an engineer in charge of such work that he would give the latter a certain percentage of the profits of the contract if he (the engineer) would, without impairing the character of the road, or doing anything to the disadvantage of the railroad company, make such variations, when it should be possible to do so, as would make the work of the contractor less expensive. Especially is this true when the work was done openly, and was in all respects indorsed by the company for which it was done.

INTEREST IS SOMETIMES ALLOWED IN AN ACTION TO RECOVER UPON UNLIQUIDATED DEMANDS, but its allowance is not proper when the action is to recover for services, the amount, character, and value of which can only be established by evidence in court, or by an accord between the parties, and are not susceptible of entertainment either by computation or by reference to market rates or other known standards.

S. M. Wilson, Wilson and Wilson, and L. D. McKisick, for the appellant.

D. M. Delmas and Henry E. Highton, for the respondent.

THE COURT. This cause has been before this court several times on an appeal, and it is unnecessary to restate the facts. The history of the case may be found in the following volumes of our reports: 44 Cal. 18; 47 Id. 89; 54 Id. 605; 52 Id. 590; 63 Id. 196. It is sufficient to say that in 1864 Charles McLaughlin, now deceased, entered into a contract with the Western Pacific Railroad Company to grade the road-bed of its railroad from near the city of San José to Sacramento, a distance of 123 miles, and to construct all the superstructures, etc., necessary to place the road in complete running order, for the sum of five million four hundred thousand dollars; and that in January, 1865, said McLaughlin made a contract with the plaintiff, Cox, and his associates, by the terms of which the latter were to grade that part of the road which lies between San José and Stockton, a distance of seventy-four and a quarter miles, to do the masonry work, and all things necessary for placing the cars, ties, and iron equipments on the track, for which McLaughlin was to pay them the sum of nine hundred thousand dollars. Cox afterwards became the as-

signee of all his associates. Payments were to be made by McLaughlin to Cox as the work progressed, at amounts to be fixed by the estimates of the chief engineer of the said Western Pacific Railroad Company. Cox finished the first twenty miles, and part of the twenty-first mile, and received certain payments; but McLaughlin then failing to make further payments as provided in the contract, Cox was unable to proceed further with the work through want of funds, and abandoned it. Upon the former trials in the court below (except the first, when an attempt was made to enforce a mechanic's lien), Cox persistently proceeded upon the theory that the failure of McLaughlin to make the payment due operated as a technical "prevention" of a compliance with the contract by Cox, and that, therefore, the latter could recover contract rates on the original contract, profits which he would have made, etc. This position was held repeatedly by this court to be untenable; and after the case was last here he amended his complaint in the court below, so as to aver a claim for the value of the work actually done, as upon a *quantum meruit*. The court below tried the case without a jury, found the value of the work, over and above all moneys paid, to be \$98,228.49, and gave plaintiff judgment for said sum, with interest at statutory rates from June, 1866, the time of the failure of McLaughlin to make said payment. From this judgment, and from an order denying a new trial, defendant appeals. Said Charles McLaughlin having in the mean time died, his executrix, Kate D. McLaughlin, was substituted as defendant. On the twenty-sixth day of April, 1888, Kate D. McLaughlin having died, J. C. Pennie, administrator of the estate of said Charles McLaughlin, was made party defendant.

The main points made by the appellant are these: 1. That the court abused its discretion in allowing said amendment to the complaint; 2. That plaintiff should not recover, because of a certain contract which he made with the chief engineer of the Western Pacific Railroad Company; 3. That there is no evidence to support the finding as to the work actually done or its value; 4. That no interest should have been allowed.

1. We think that there was no abuse of discretion in allowing the amendment setting up the *quantum meruit*. There were no new facts stated upon which a new cause of action was based. The facts as stated in all the complaints were substantially the same; and indeed, it is not clear that plain-

tiff could not have proceeded upon the theory of a *quantum meruit* under his former complaints. The same contracts, assignments, the work done and materials furnished, performance by the plaintiff, the breach by the defendant, the existence of all the conditions precedent to payment, have appeared in all of the complaints as the basis upon which the right to compensation in the plaintiff rested. When this case was last here, the court directed that the judgment should be reversed, and that judgment should be entered in the court below on the findings for defendant.

Afterwards, on rehearing, the judgment of this court was modified so as to reverse the judgment of the lower court, and send the case back for a new trial. There must have been some object in this modification; and in view of the facts which have been repeatedly before the court, it was evidently regarded as possible to frame a complaint which would enable the plaintiff to recover the reasonable value of the services rendered and materials furnished. Of course, unless the facts stated constitute a new cause of action, the plaintiff's cause is not barred by the statute of limitations.

2. Under the contract between the railroad company and McLaughlin, the road was to be constructed according to a general route and profile; but it was to be varied according to the directions of the chief engineer. Cox was to receive the round sum of nine hundred thousand dollars for his entire work between the points named in his contract with McLaughlin, whether the variations ordered by the engineer should make that work heavier or lighter. Under these circumstances, Cox entered into a secret contract with the person who, for part of the time, was the engineer, that he would give to said engineer a certain percentage of the profits of his contract if he (the engineer) would, without impairing the character of the road, or doing anything to the disadvantage of the railroad company, make such variations, when it should be possible to do so, as would make the work of said Cox less expensive. It is claimed that this constituted a breach of the contract by Cox, Myers, & Co., a fraud upon the defendant, which, in any event, should defeat the claim of the plaintiff. The court found that both the railroad company and McLaughlin were willing that the engineer should make the work lighter without injury to said interest; that the variations were made, in some instances, at the request of said company and McLaughlin, and were all submitted to and

approved by them; and that the said contract between said engineer and Cox was not fraudulent. Under his agreement with Cox, the engineer, for a period of about three months, shared in the dividends of the contractors to the amount of three thousand five hundred dollars altogether. The original profile had to be succeeded by a definite location, which necessitated many changes; and these changes, as we have seen, were sanctioned by all parties. It was possible for the engineer, in making his definite location, by the exercise of extraordinary diligence and skill, to so perfect the work as to suit the convenience and the interest of all parties concerned. It appears that his work was done openly, and was in all respects indorsed. After the period mentioned, in which the engineer was receiving ten per cent under said agreement with Cox, a new contract was made between the contractors and McLaughlin.

Assuming that the contract between the engineer and Cox was one not proper to have been made, we cannot see how McLaughlin was in any way injured by it, or that it should prevent plaintiff from recovering in this action. McLaughlin received all the benefit of Cox's work, and was paid for it by the railroad company without objection. Furthermore, it is proper to say that this same claim of fraud has appeared in every answer and on every appeal without receiving any notice. If it has been passed upon in any respect, it must have been adversely to the defendant. We must assume that this court, on former appeals, has considered all the points, this one among the rest. The case has appeared here repeatedly upon substantially the same facts. If this point now made is good, it has always been good, and certainly would have been noticed in the former decisions of this court herein.

Again, if we admit that this agreement with the engineer was fraudulent, and sufficient to prevent a recovery by Cox under his contract, the answer is, the present action is not upon such contract, but upon a *quantum meruit* for the value of the services and materials furnished.

3. After the lapse of a great many years, it was of course a difficult thing to show accurately the amount and value of the work actually done. The whole contract price for the entire distance of the road which was to have been built by Cox was nine hundred thousand dollars. McLaughlin himself was to be paid for the same work two million fifty-eight thousand dollars, absolutely, whether performed by him or for him by

others; and he testified that the price which he was to be paid for the work was reasonable. Mann, the agent for McLaughlin, who executed the contract for McLaughlin, testified that the contract was fair; that the price, with ten per cent kept back, would allow a man to build the road, and not give him much profit, if any. At the time the work was done, the chief engineer believed that the work could not be done for the price named. Under their contract, the contractors were entitled for the first twenty miles completed to the sum of \$308,427.46. McLaughlin's contract with the railroad company entitled him to receive from it the sum of \$440,000, and he actually cleared the sum of \$131,573 profit on the first twenty miles. There was testimony showing that there are no means now of ascertaining how much earth and how much rock had been removed by the contractors upon the road. Defendant's witness Stangroom testified that the value of the labor performed and materials furnished by the subcontractors was \$186,963. The plaintiff testified that the actual value of the work and material was more than the estimates made by the engineer,—was, in fact, about \$360,690. The court found that the value of the labor and materials was \$285,918.49. It would seem, therefore, that the court took a sum which is nearly an average between the estimates made by the plaintiff and by Stangroom, and rendered judgment accordingly. The uncontradicted testimony shows that the work done was about four ninths of the whole work. The price to be paid for the entire work was nine hundred thousand dollars. The twenty miles were completed according to the contract in a good and workmanlike manner. Changes and deviations were made under the orders and with the consent of McLaughlin and the railroad company. The work was turned over to the company by McLaughlin in fulfillment of his contract with the company, and according to estimates made on his behalf. If the rule be that the contractors are entitled to such proportion of the whole contract price as the work done bears to the whole work, then the evidence would warrant a judgment in favor of the plaintiff for four hundred thousand dollars; but we assume that the value must be determined regardless of the prices fixed in the contract, and it is sufficient to say that the evidence as to such value is conflicting, and the finding of the court is warranted by some of the testimony in the case.

4. The court below allowed interest on the amount recovered

from June 15, 1886. Appellants attack this portion of the judgment, as unwarranted by the facts and law.

It may be stated, as a general principle, that interest is not allowed on unliquidated damages or demands.

This term "unliquidated damages" applies equally to cases of tort, as slander, assault and battery, etc., and to cases upon a *quantum meruit*, for goods sold and delivered or services rendered.

The reason of such denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying.

The damages in such cases are an uncertain quantity, depending upon no fixed standard, are referred to the wise discretion of a jury, and can never be made certain except by accord or verdict.

As to such damages there can be no default, and hence the initial point at which to fix the starting of interest is wanting.

To this general rule there are many exceptions, and while it is said "a demand is unliquidated if one party alone cannot make it certain,—when it cannot be made certain by mere calculation" (1 Sutherland on Damages, 610),—yet the same author, in the next sentence, adds, "the allowance of interest as damages is not dependent on this rigid test." A review of the cases relied upon in support of this last assertion assert this proposition: "Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which he has done him": *Van Rensselaer v. Jewett*, 2 N. Y. 135; 51 Am. Dec. 275; *Lush v. Druse*, 4 Wend. 313; *Van Rensselaer v. Jones*, 2 Barb. 643; *Adams v. Fort Plain Bank*, 36 N. Y. 255.

These and many other cases which might be cited from New York were mainly based upon express contracts, in which money was to be paid, services rendered, or a duty to be performed at a fixed and certain time,—cases in which the default of the debtor at the fixed period was apparent, the amount of the recovery, and not the right to recover at all, being the sole question.

This further distinction may be drawn from the New York cases: notwithstanding the damages are unliquidated and not capable of ascertainment by computation, still, if they can be

determined by computation, together with a reference to well-established market values, then interest may be recovered.

The reason given for this modification of the earlier rule is, that in many cases market values are so well established and so easily obtained that it is easy for the debtor to obtain some proximate knowledge of how much he is to pay.

This distinction was noted by Selden, J., in *McMahon v. New York and Erie R. R. Co.*, 20 N. Y. 463.

Under the law as held in New York at the present time, it is not far wide of the mark to say all the cases in which interest may be recovered by the creditor, upon an unliquidated demand for damages arising upon a contract, proceed upon the theory: 1. That the damages are capable of ascertainment by calculation; 2. That if not capable of being thus ascertained, they may be determined by reference to well-established market values, together with computation; or 3. That the debtor is in default in not performing some obligation devolving upon him, whereby the amount of his debt could be rendered certain, or susceptible of being made so by calculation.

These distinctions were referred to in *McMahon v. New York and Erie R. R. Co.*, 20 N. Y. 463, and the right to recover interest upheld upon the third ground, namely, that it was the duty of defendant to have caused its engineer to furnish estimates of the work done, and that he had he done so to the amount of the claim would have been so ascertained as to carry interest.

We have referred to some of the New York cases for the reason that we think that they are in the advance upon the question of allowing interest upon unliquidated demands.

The case at bar is not an action upon an express contract between the parties; such a contract, it is true, existed, and had plaintiff recovered under it he would have been entitled to interest upon the several payments provided for therein from the dates at which they fell due; but for reasons not now necessary to be enumerated, a recovery upon the contract has been abandoned, and plaintiff counts upon a *quantum meruit* for the performance of labor and services, precisely as he might have done had there been no contract.

His services and the material furnished by him were uncertain as to amount, character, value, and time of payment, until fixed by a verdict or findings of the court. They were

not of a character to have a fixed or ascertainable market value.

They could not be ascertained by computation, either in extent or value. Defendant was not in default for not ascertaining that which, outside of the abandoned contract, he could not ascertain except by an accord or by verdict, or its equivalent.

In *Bank of California v. Northam*, 51 Cal. 387, this court held that interest could not be recovered upon an account for goods, wares, and merchandise sold and delivered. In *Brady v. Wilcoxson*, 44 Cal. 239, it was said: "The plaintiffs are not entitled to interest. Their claim was an uncertain and unliquidated demand. The amount due cannot be ascertained from the face of the contract, but is to be settled by process of law on such demands; interest *eo nomine* cannot be allowed.

The case of *Hamer v. Hathaway*, 33 Cal. 117, cited by respondent, was an action of trover, in which the rule as to damages is quite different from that in cases like the one at bar. The rule in such cases was, that the plaintiff could recover the value of the property, with legal interest from the time at which the value is estimated: *Douglass v. Kraft*, 9 Id. 562. Section 3336 of our Civil Code has substantially continued the rule as it existed previously, with the addition that under certain specified circumstances no interest can be recovered.

In *McFadden v. Crawford*, 39 Cal. 662, which was an action for work, labor, and services, this court allowed interest on the demand from the date of the filing of the complaint, reversing the action of the court below allowing interest from the rendition of the services.

The rule thus enunciated finds some support in *Sutherland on Damages*, where it is said: "After demand, or after commencement of suit, accounts generally bear interest. The commencement of suit is a formal demand. Accounts are generally made of items which represent money paid, goods sold and delivered, or services rendered, on request. They are severally demands on which interest may be claimed, though the price had not been fixed by agreement, and must be established by evidence": 1 *Sutherland on Damages*, 616.

The same author adds that "where, however, the account or demand is for particulars, the value or amount of which cannot be measured or ascertained by reference to market

rates, and are intrinsically uncertain, or the creditor's demand of payment is excessive or vague, a different case is presented."

The distinction mentioned is pointed out in many of the cases, and it is only by bearing it in mind that otherwise apparent conflict can be reconciled.

We are not prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand: *Mix v. Miller*, 57 Cal. 356, decided since the adoption of the code, and *McFadden v. Crawford*, *supra*, decided previously, attest the doctrine that in this state interest is allowable on such demand under some circumstances.

These were cases in which the contract had been fully performed by the creditors, the fruits thereof accepted by the debtors, without objection, and they were clearly in default, and in the latter case the only question was as to value.

But where, as in the case at bar, the amount of the services, their character and value, can only be established by evidence in court, or by an accord between the parties, and are not susceptible of ascertainment, either by computation or by reference to market rates, or other known standard, we are of opinion plaintiff is not entitled to interest prior to verdict or judgment.

The cause is remanded, with directions to the court below to modify its judgment in favor of the plaintiff by striking out the interest, and leaving the judgment to stand in favor of plaintiff for \$98,228.49, with interest thereon at seven per cent per annum from October 21, 1886, the date of the entry of such judgment, together with costs of suit. The judgment and order are in all other respects affirmed.

TEMPLE, J., dissented. After reviewing the facts at some length, he concluded that there was no rescission of the contract between plaintiff and defendant by their mutual consent; that plaintiff knew defendant was absent endeavoring to realize on his securities; that plaintiff's absence, under the circumstances, did not indicate an intention to abandon the contract, or to refuse to go on with it; that the relation between plaintiff and the engineers infected the contract with fraud, and precluded a recovery upon it; that the allowance of the amendment to the complaint was an abuse of discretion, because it was the insertion of a new cause of action, after the litigation had been pending some sixteen years; and that there was no evidence to sustain the finding that plaintiff was entitled to recover the amount for which he recovered judgment.

COMPLAINT — AMENDMENT OF. — Amendment of declaration will not be allowed, if a new cause of action is thereby introduced: *First Nat. etc. v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; *Stevenson v. Mudgett*, 10

N. H. 338; 34 Am. Dec. 155. The criterion for determining whether amendment to complaints are allowable is, to inquire whether the proposed amendment is or is not another cause of action: *Maxwell v. Harrison*, 8 Ga. 61; 52 Am. Dec. 385. Amendment to complaint changing cause of action from one of slander into malicious prosecution will not be allowed: *Shock v. McChesney*, 4 Yeates, 507; 2 Am. Dec. 415. Amendments changing whole character of the litigation will not be allowed: *Lloyd v. Brewster*, 4 Paige, 537; 2 Am. Dec. 88; *Ball v. Claflin*, 5 Pick. 303; 16 Am. Dec. 408; *Shock v. McChesney*, 4 Yeates, 507; 2 Am. Dec. 415. Amendment should be allowed where contract declared on, or cause of action alleged and redress sought, are the same in proposed amendment as in original declaration: *Stewart v. Kelley*, 16 Pa. St. 160; 55 Am. Dec. 487.

INTEREST — UNLIQUIDATED DAMAGES. — Interest is not allowable for breach of contract, if the damages sought to be recovered are so unliquidated and uncertain as to require proof and adjudication to make them certain: *Coburn v. Goodall*, 72 Cal. 498; 1 Am. St. Rep. 73, and note 83. In Nebraska, interest is allowed as compensation for the withholding of or the use of money, and not as punitive damages for the wrongful withholding thereof: *Bell v. Arndt*, 24 Neb. 261.

HOGINS v. SUPREME COUNCIL.

[76 CALIFORNIA, 109.]

LIFE INSURANCE — BREACH OF CONDITION AGAINST USE OF ALCOHOLIC LIQUORS. — If a certificate of insurance is issued by an order whose distinguishing feature is its requirement of daily abstinence from the use of liquors as a beverage, and if the application for such insurance contains an agreement that the assured will comply with all the laws, regulations, and requirements of the order, and the certificate a statement that it is issued upon the express condition that the assured shall in every particular, while a member of the order, comply with all its laws, rules, and requirements, the policy becomes forfeited and void upon the assured commencing the use of alcoholic liquors as a beverage. His suspension or expulsion from the order is not a condition precedent to such forfeiture.

ACTION on insurance policy. Judgment for the defendant.

R. B. Mitchell, for the appellant.

Arthur Rodgers, for the respondent.

PATERSON, J. This is an action to recover from the defendant the amount of one thousand dollars on a beneficiary certificate issued by the Grand Encampment of the Champions of the Red Cross of California, upon the life of appellant's husband. The defense is breach of the conditions of the contract of insurance. Judgment was rendered in the court below in favor of the defendant.

The Champions of the Red Cross is a temperance order or

fraternity. The order originally consisted in this state of a supreme council, a grand encampment, and subordinate encampments. The insurance system was under the supervision of the grand encampment, which issued the certificates. On October 20, 1881, the grand encampment went out of existence, and defendants assumed payment of all policies then in force. The system of insurance is called the mutual life benefit system, and every full member who had taken the three degrees of a subordinate encampment, and had complied in every particular with all the laws, rules, and requirements of the order, was entitled to participate in this insurance from one thousand dollars upward, according to the number of members.

On September 26, 1879, Daniel Hogins, a member in good standing of Castle Encampment No. 68, San Francisco, made application in writing for a certificate payable at his death to his wife, appellant herein, and said certificate was regularly issued on October 2, 1879, and after having been regularly countersigned as required by the laws of the order, was, on October 10, 1879, delivered to him, and by him thereupon delivered to appellant. The court found that "on July 9, 1883, the said Daniel Hogins commenced drinking spirituous liquors as a beverage, and did thereafter continue upon a drinking spree, and use whisky, brandy, and other alcoholic stimulants as a beverage, and on Friday, July 13, 1883, at about seven o'clock, P. M., he died, his death being hastened by the excessive use of such liquor." After the issuance of the policy, and until his death, no charges were preferred against Hogins; his monthly dues and assessments on his certificate were paid as fast as they became due. In his written application for a certificate, Hogins agreed "that a compliance with all the laws, regulations, and requirements which now or hereafter may be enacted by our said order is the express condition upon which I am to be entitled to participate in the mutual benefit life system."

The certificate itself contained this clause: "This certificate is issued upon the express condition that said Daniel Hogins shall in every particular, while a member of our said order, comply with all the laws, rules, and requirements thereof."

The controlling and distinguishing feature of this order is its requirement of daily abstinence from the use of liquors as a beverage by its members. It is the fundamental principle in every degree. In order to become a member of the order,

or entitled to a beneficiary certificate, the applicant was required to take all the degrees, and pledge himself upon taking each one that, so long as he was a member of the order, he would wholly abstain from the use of all alcoholic liquors as a beverage. Violations of this pledge were punished by suspension. The system of insurance is clearly intended to be confined exclusively to temperance people. The applicant, Hogins, so understood it. In his application he expressly agreed that he should not be entitled to the benefits of the system unless he complied with all the laws, regulations, and requirements of the order. The clause quoted from the certificate does not, perhaps, literally express the meaning intended, but it is quite clear what was meant and intended by the parties. It does not say that payment is contingent upon the express condition, but such was clearly the intent. Appellant claims that the condition is for the issuance merely, but the conditions are in their nature matters to occur in the future. "That said Daniel Hogins shall in every particular, while a member of our said order, comply with all the laws, rules, and requirements thereof," shows beyond controversy that his conduct after the issuance of the certificate was to be the condition of payment. His application shows clearly that such was his intention and contract, and we think that the application and the certificate may be read together for the purpose of showing that the clause in the certificate is an express condition precedent to the payment of the insurance.

"In all contracts of insurance, certain statements are made, certain stipulations are entered into, and certain provisos, conditions, and by-laws are introduced or referred to in a more or less explicit manner. As a general rule, if these statements, stipulations, etc., are contained in or expressly made a part of the policy, they become warranties, and are so denominated in the law of insurance. . . . By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss, should the statement prove untrue or the course of conduct promised be unfulfilled. The warranty is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with. . . . Any statement or stipulation upon the literal truth or fulfillment of which depends the validity of the contract, whether appearing as a condition or warranted, or modified otherwise, amounts to a

warranty": May on Insurance, 160, 161. The same principles apply to all kinds of insurance.

We do not think that suspension or expulsion by the order was necessary to forfeit the policy. In *Knights of Honor v. Johnson*, 78 Ind. 111, the certificate contained this clause: "Providing he be in good standing when he dies." It was held simply, in that case, that it was not shown that the member was not in good standing when he died. We see nothing in *Bidwell v. Connecticut M. L. Ins. Co.*, 3 Saw. 261, which holds that, unless the certificate refers to the written application therefor, the application forms no part of the contract. As we construe the clause in the certificate, it is in substance and effect the same as the clause in the application which we have referred to, and was so intended by all parties.

It is said that the defendant can always refuse to pay the certificates on the ground that the second part of the obligation, namely, "to do all things in his power to promote the cause of temperance," has not been kept. It would be very difficult, indeed, for the beneficiary to prove how much was in the power of the deceased in the way of promoting the temperance cause, and the failure on behalf of the insured to prevent another from taking a drink might be claimed by the defendant as a forfeiture, etc. It is sufficient to say here that Hogins agreed, among other things, not to drink alcoholic liquors, and that he willfully broke the condition in violating the fundamental and controlling principle of his obligation and of the order.

Judgment affirmed.

LIFE INSURANCE—CONDITION AS TO DEATH BY REASON OF DRUNKENNESS. — Where a policy was conditioned to become void if death should occur "while the insured was or in consequence of his being under the influence of intoxicating drink," if he was under the influence of intoxicating drink when he died, the policy was avoided, whether the drunkenness was the proximate or remote cause of death: *Shader v. Railway etc. Co.*, 66 N. Y. 441; 23 Am. Rep. 65.

OGLESBY v. HOLLISTER.

[76 CALIFORNIA, 123.]

NOTICE. — REGISTRATION OF TAX DEED VOID UPON ITS FACE does not impart notice to any person.

CO-TENANT IS UNDER NO OBLIGATION TO PAY TAXES upon the moiety of another co-tenant.

CO-TENANT'S ADVERSE POSSESSION, EVIDENCE OF. — The purchase by a co-tenant at a tax sale of the interest of another co-tenant, and the taking of a deed purporting to convey the same, are acts indicating his purpose to claim the whole title adversely to his co-tenant.

TENANT IN COMMON, DISSEISIN BY. — One tenant in common may disseise another; but, *prima facie*, the possession of one is also that of the other. An ouster or disseisin is not to be presumed from the mere fact of sole possession, but it may be proved by sole possession accompanied by a notorious claim of exclusive right. There can be no disseisin or adverse possession until there has been a disclaimer by the assertion of an adverse title and notice thereof to the other co-tenant, either direct or inferable from notorious acts.

CO-TENANCY — OUSTER. — WHETHER ONE CO-TENANT HAS OUSTED ANOTHER is a question of fact for the determination of the jury whenever there is any substantial evidence of an ouster. A jury is warranted in inferring an ouster from the exclusive possession by one tenant in common for a great number of years without any accounting to or recognition of right in his fellow-commoner, or any evidence explaining why the co-tenant neglected to assert his right.

ACTION to quiet title. Judgment for the plaintiff.

E. B. Hall, J. W. Taggart, and R. B. Canfield, for the appellants.

W. C. Stratton, for the respondents.

McKINSTRY, J. An action to quiet the title to block of land No. 56½, in the city of Santa Barbara. It was commenced February 16, 1887.

On the eighth day of April, 1873, A. A. Oglesby and W. F. Russell became the owners at law, as tenants in common, of blocks Nos. 56½ and 70½, by virtue of a deed of conveyance thereof executed by Frissius and Hernster. Russell paid no part of the purchase-money, and on the same day he and A. A. Oglesby entered into the agreement and executed the instrument following: "Whereas A. A. Oglesby and W. F. Russell have purchased blocks Nos. 56½ and 70½, in the town of Santa Barbara, for their joint and equal benefit, and said A. A. Oglesby furnished all the purchase-money, now, it is hereby understood and agreed that they, each of them, withhold the property from sale for the period of one year from date, unless sooner sold by mutual agreement, and out of any

sale the said Oglesby shall first receive one thousand six hundred dollars in United States gold coin, with interest thereon at the rate of one per cent per month, and then the balance of property be equally divided between them; but, notwithstanding, the said W. F. Russell may at any time within the year afterwards pay his share of the purchase-money, with the interest thereon, without agreeing to a sale."

No part of W. F. Russell's share of the purchase-money has ever been paid, nor has any portion of the property been sold or conveyed except as herein stated.

Prior to the conveyance from W. F. to D. H. Russell, hereinafter mentioned, W. F. Russell mortgaged the undivided one half of the lands described to W. W. Hollister. On the 20th of September, 1875, W. F. Russell conveyed his right, title, and interest in the lands to D. H. Russell. W. F. Russell died March 26, 1877, and D. H. Russell, named as grantee in the deed aforesaid, was appointed administrator of his estate. On the thirteenth day of July, 1877, W. W. Hollister commenced an action to foreclose his mortgage, wherein D. H. Russell as owner of the equity of redemption, and D. H. Russell as administrator, were made parties defendant.

While said action was pending, and on the thirteenth day of May, 1878, the tax collector of Santa Barbara County made and delivered to A. A. Oglesby a tax deed, purporting to convey an undivided one half of said block of land No. 56½, which deed was acknowledged and recorded on the same day.

In the suit brought by W. W. Hollister, a decree foreclosing his mortgage and the rights of defendant in the mortgaged premises was entered, and thereunder the premises mortgaged were duly sold. Said Hollister became the purchaser at such sale, and no redemption being had, received a sheriff's deed, conveying all the interest of the estate and heirs of W. F. Russell and the interest of D. H. Russell in the mortgaged premises; which deed was made, executed, and recorded March 28, 1879.

A. A. Oglesby died July 14, 1884; W. W. Hollister died August 8, 1886.

The plaintiff acquired the title of which A. A. Oglesby died seised in the two blocks of land, by deeds from all his heirs, made and recorded January 24, 1887. The defendants are the heirs of W. W. Hollister, and the executors of his estate.

Plaintiffs claim that the ancestor of their grantors disseised his co-tenant of block 56½, and remained in adverse possession

of the same, asserting title to the whole thereof, until the date of his death, and that their grantors and they have been in adverse possession since that date. They aver that D. H. Russell was ousted from the possession on the 13th of May, 1878, the date of the tax deed.

The court below found:—

“6. That when said tax deed was issued to said A. A. Oglesby, and recorded, he ousted said D. H. Russell and W. W. Hollister, and the whole world, from the said real property, and thereafter was in the exclusive possession of the same, under a claim of title to the whole thereof, exclusive of other right, and ever since said tax deed was issued to said Oglesby, the whole of said block has been assessed to him and his successors, and he and they have claimed title to the whole of said block No. 56½, and held possession adverse to said D. H. Russell and W. W. Hollister, and to the defendants, and the whole world; and ever since the thirteenth day of May, 1878, and for more than five years before the commencement of this action, said A. A. Oglesby and his successors and the plaintiffs have been, and plaintiffs now are, in the actual, open, notorious, peaceable, quiet, and exclusive possession of the whole of said block No. 56½, and during all of that time, they have paid all assessments and taxes of every kind which have been levied, assessed, or taxed against said block, or any part thereof, or interest therein.

“7. That said W. W. Hollister, at the time said mortgage was made to him by said W. F. Russell, had notice, by reason of the records in the office of the county recorder of the county of Santa Barbara, of the equities of said W. F. Russell and said A. A. Oglesby.”

Appellants contend the findings are not sustained by the evidence. If there is evidence to sustain the finding that A. A. Oglesby and his successors were in adverse possession of lot 56½ for more than five years prior to the commencement of this action, such adverse possession conclusively establishes a previous ouster, the precise date whereof is immaterial.

It is said by respondent that the record of the tax deed gave constructive notice to W. W. Hollister of its contents, and of the fact that A. A. Oglesby was claiming title thereunder to the undivided half of the block No. 56½, which had belonged to D. H. Russell. But the tax deed was void on its face, and did not affect the title: Civ. Code, sec. 1158. Its

registration gave no notice to any person: *Sawyer v. Adams*, 8 Vt. 172; 30 Am. Dec. 459; *Mesick v. Sunderland*, 6 Cal. 315.

Nevertheless, the attempted assessment under which the sale for taxes was made was an attempted assessment of D. H. Russell's undivided one-half interest in block 56½. No duty was imposed upon A. A. Oglesby to pay the taxes on that half. We may assume that a tax deed, void on its face, constitutes no color of title in such sense that it extends an actual possession of part of the land described in it to the limits of such description. Here A. A. Oglesby had and continued in the actual possession of the whole of block 56½,—whether for himself alone, or for himself and D. H. Russell, is a different question. His attempted purchase of his co-tenant's title, and the taking of a deed purporting to convey the same, were acts indicating his purpose to claim the whole title adversely to his co-tenant: *Pillow v. Roberts*, 13 How. 472, 477.

One tenant in common can disseise another. But, *prima facie*, the possession of one is also that of the other. An ouster or disseisin is not to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied by a notorious claim of exclusive right: *Ricard v. Williams*, 7 Wheat. 121. The difference between that and other cases is, that acts which, if done by a stranger, would *per se* be a disseisin, are, in cases of tenancies in common, susceptible of explanation consistent with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseisin. It depends upon the intent with which they are done and their notoriety: *Prescott v. Nevers*, 4 Mason, 326. Where a possession commences with the consent of the owner, which is the presumption when one tenant in common is in sole possession, there can be no disseisin or adverse possession until there has been a disclaimer by the assertion of an adverse title, and notice thereof to the owner, either direct or to be inferred from notorious acts: Wood on Limitations, 507.

Nevertheless, the real question, Was there an ouster and consequent disseisin of the co-tenant? depends upon the circumstances of each case. It is a question of fact, to be submitted to the jury wherever there is any substantial evidence of an ouster: Wood on Limitations, 507, 509, 510. It has very frequently been held that the exclusive possession by one tenant in common for a great number of years, without any accounting to or recognition of right in his fellow-commoner, or any evidence explaining why the co-tenant neglected to assert his

right, is evidence from which the jury may infer actual ouster and adverse possession: *Lefavour v. Homan*, 3 Allen, 355; Freeman on Cotenancy, sec. 442, and cases there cited.

It may be conceded, however, for the purposes of this decision, that in this state the fact of exclusive possession or pernancy of the profits by one tenant, however long continued, and although there has been no assertion of right by the co-tenant, and there is no explanation of his silence, is not of itself sufficient proof of ouster or desseisin: *Miller v. Myers*, 46 Cal. 535. Yet the fact is not immaterial, and if possession has been accompanied by acts indicating an adverse claim of title of so notorious a character as to satisfy a jury that a person, ordinarily attentive to his interests, in the position of the co-tenant, would have notice of the adverse claim, a finding of adverse possession will be sustained. While the exclusive and uninterrupted possession and reception of the profits for a long period may not be sufficient evidence of adverse holding, it is some evidence, because it accords with ordinary experience that men do not sleep on their rights, and property owners usually manifest some regard for their property rights.

Nor should the circumstance that neither D. H. Russell nor his grantor or successor ever paid or offered to pay the purchase-money for one half of the blocks be entirely ignored in considering the question of adverse possession. There enters into the notion of a title acquired by adverse possession the element of acquiescence or abandonment of his title by the party who fails to assert it for the statutory period. The jury may have believed that D. H. Russell and his successors intended to abandon a legal right to possession, which, upon every equitable consideration, ought not to have been insisted upon; that they did not intend to assert a title to one half of the land after a failure to pay Oglesby for it within the time limited by the agreement between him and W. F. Russell. The intent of A. A. Oglesby and his successors to claim adversely being shown, would not less evidence suffice to establish notice of such adverse intent to persons in the position of defendants and their predecessors than is necessary in ordinary cases of tenancies in common? Even if W. F. Russell obligated himself to pay to Oglesby one half the purchase price, it was never paid; Oglesby did not attempt to enforce its payment by legal process. Under such circumstances, Russell and his successors would naturally have regarded acts of ownership by Oglesby, otherwise susceptible of explanation as in accord

with the relation of tenants in common, as evidence that Oglesby intended to claim the whole title against the tenant in common who had paid nothing.

At the trial below there was evidence that A. A. Oglesby was, as found by the court, "in the open, notorious, peaceable, quiet, and exclusive possession of the whole of block 56½." There was evidence that in the year 1874 or 1875 he fenced each of the blocks separately; that from 1882 the block 56½ was exclusively in the occupation of said Oglesby and his tenants up to his death, he receiving the whole of the rents, accounting to no person for any part thereof, and not being called on to account therefor; evidence that he had repeatedly entertained propositions for the purchase of the whole of the land, and attempted to sell the whole, as owner of the whole; evidence that the blocks were generally known as "Oglesby's blocks," and that since his attempted purchase of the co-tenants' interest at the tax sale, he and his successors have paid all taxes and public charges assessed against block 56½.

Taking the evidence as a whole, we cannot say that the court below was not justified in deciding that the acts and conduct of Oglesby and his successors with respect to the property were of so open and notorious a character as that their co-tenants should be held to have had notice that he and his successors were in possession, claiming the entire title.

But W. F. Russell did not absolutely obligate himself to pay one half of the purchase-money. In a certain event he had the privilege to do so within a definite period, and, from the nature of the transaction, time was of the essence of the contract. Russell risked nothing by the arrangement. If the price of the blocks went up, and he and Oglesby agreed upon sales during the first year, he would get one half of the excess beyond the price paid by Oglesby, or if he did not agree, he could at his option secure the equitable title by paying one half of such price. The written contract contains a declaration of an express trust on his part. He received the legal title to one half in trust that he would convey in case of sales by mutual assent, as therein provided for, or that within a year "afterwards" he would, at his option, take the beneficial interest himself on paying to Oglesby one half of the purchase price advanced by him: Civ. Code, sec. 857. As the legal title was already in him, there would be no transfer of it in case he paid the money, but upon such payment he would become vested with the entire ownership, legal and equitable.

As the lands were not sold to third persons, and Russell did not purchase himself, the purposes of the trust failed. At the most, there remained in Russell and his successors the bare legal title to an undivided one half of block 56½, Oglesby, who was entitled to the entire beneficial use of the property, being in possession. This right, which would constitute a defense to an action of ejectment by defendants, and the possession under it, the successors of the latter had the right to have quieted in the present action.

Even if it could be held that time was not of the essence of the contract of 1873, the result would be the same, since the money which W. F. Russell had the option to pay was not paid when this action was commenced,—fourteen years after the contract was made. After this great lapse of time, defendants could not secure the equitable rights of plaintiffs by paying the money. And they do not offer to pay it.

Judgment and order affirmed.

CO-TENANCY. — CONVEYANCE BY ONE TENANT IN COMMON to a stranger does not change the relation of co-tenancy theretofore existing: *Frick v. Sinon*, 72 Cal. 337; 7 Am. St. Rep. 177, and note 180; *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, note 284. Although, as a general rule, entry of one tenant in common will inure to the benefit of all, yet he may so enter and hold as to render his entry and possession adverse, and an ouster of his co-tenants: *Greenhill v. Biggs*, 85 Ky. 155; 7 Am. St. Rep. 579, and note 582. Exclusive possession by one co-tenant, who has taken conveyance purporting to convey the property in severalty, does not constitute an ouster of his co-tenants: *Hignite v. Hignite*, 65 Miss. 447; 7 Am. St. Rep. 673, and note 674. Sole possession of property incapable of actual division, or separate occupancy by one co-tenant, is an ouster as to the other: *Annely v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725, and note 733.

CO-TENANCY — PAYMENT OF TAXES. — Tenant in common may compel contribution from co-tenants for their share of taxes rightfully paid by him: *Eads v. Retherford*, 114 Ind. 273; 5 Am. St. Rep. 611, and note 613.

CO-TENANCY — TAX DEED TO ONE TENANT. — One tenant in common does not disseise another by entering under tax deed, and exercising rights and acts of ownership thereunder: *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288, and note 295; compare *Holterhoft v. Mead*, 36 Minn. 42.

REGISTRATION — VOID INSTRUMENTS CANNOT BE LEGALLY RECORDED: *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237.

MILLER v. CALIFORNIA INSURANCE COMPANY.

[76 CALIFORNIA, 145.]

PERILS OF THE SEA are all perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such. By the Civil Code of California they are defined to be: "Storms and waves; rocks, shoals, and rapids; other obstacles, though of human origin; changes of climate; the confinement necessary at sea; animals peculiar to the sea; and all other dangers peculiar to the sea."

BURSTING OF A BOILER IS NOT A PERIL OF THE SEA, either as understood in the law of marine insurance, or as defined by the Civil Code of California.

ACTION on a policy of marine insurance. Judgment for the defendant.

Barham, Halstead, and Bolton, and A. E. Bolton, for the appellant.

E. W. McGraw, for the respondent.

PATERSON, J. This is an action brought on a policy of marine insurance issued by the respondent on the steamer Pilot. The risks insured against were as follows: "Touching the adventures and perils which this insurance company is content to bear and take upon itself in this policy, they are of seas, fires, pirates, assailing thieves, jettison, barratry of the master or mariners (unless the assured be owner or part owner of the vessel), embezzlement and illicit trade excepted in all cases, and all other losses and misfortunes that shall come to the hurt, damage, or detriment of the said vessel, or any part thereof, to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by this policy. . . . It is also agreed that in case of insurance on a steamer this company is not liable for any injury, derangement, or breakage of the machinery or bursting of the boilers, unless occasioned by stranding."

The complaint alleges that on May 25, 1883, "the boiler on said vessel exploded, and said vessel became then and there unmanageable, and swung around on the water, and within a few minutes thereafter sank and became a total wreck, and was wholly and totally lost to the owner thereof, and was abandoned by the owner to defendant."

There is no allegation in the complaint that, under the customs of insurance in San Francisco, insurers are liable for explosions of boilers or damages resulting therefrom.

A demurrer to the complaint was filed, on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff declining to amend, judgment was entered for defendant.

Passing over the question as to the sufficiency of the allegation in the complaint to show that the destruction of the vessel was caused by the bursting of the boiler, or by any other means admitted to be such as would make the company liable, and conceding that the complaint shows the loss to have occurred by reason of the bursting of the boiler without any fault of the plaintiff, these inquiries remain: 1. Is the explosion of the boiler a peril of the sea within the first clause above quoted? and 2. If it be a peril of the sea, are not the damages resulting therefrom excepted under the special provision of the policy which is quoted above, and which relates to the bursting of the boilers?

Perils of the sea are defined by our Civil Code to be: "Storms and waves; rocks, shoals, and rapids; other obstacles, though of human origin; changes of climate; the confinement necessary at sea; animals peculiar to the sea; and all other dangers peculiar to the sea": Civ. Code, sec. 2199. The bursting of a boiler is not within any of the first six causes named. Is it a danger peculiar to the sea? Perils of the sea have been defined to be: "All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such": *T. & M. I. Co. v. H. F. & Co.*, House of Lords, July 14, 1887. In that case it was said: "The damage to the donkey-engine was not through its being in a ship at sea. The same thing would have happened had the boiler and engines been on land, if the same mismanagement had taken place. The sea, waves, and wind had nothing to do with it. . . . It is, I think, impossible to say that this is damage occasioned by a cause similar to the perils of the sea on any interpretation which has ever been applied to that term. It will be observed that Lord Ellenborough limits the operation of the clause to marine damage. By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject, or which possess, in relation to it, a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance. . . . But the explosion of the boiler on board the

Panama had no marine character at all. It might have happened in precisely the same way, and done the same kind of damage, if a similar engine had been in use for the purpose of moving manufacturing machinery on shore." These views seem to express very clearly the proper meaning of the seventh clause of section 2199, *supra*.

In support of the contention that an explosion of the boiler is a peril embraced within the list of perils insured against by this policy, appellant cites *Adm'rs of Perrin v. Protec. Ins. Co.*, 11 Ohio, 169, 38 Am. Dec. 728, and *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 413. In the Ohio case, the risks insured against were described in the policy as follows: "Of the seas, rivers, fires, enemies, pirates of the rivers, assailing thieves, and all other losses and misfortunes which shall come to the damage of said steamboat according to the true intent and meaning of said policy." It was there held that the loss occasioned by the bursting of a boiler was a loss within the policy; but we do not understand the court to have held in that case that such a loss was a loss by peril of the seas. In *West India T. Co. v. Home & Col. M. Ins. Co.*, L. R. 6 Q. B. Div. 57, the Ohio case was quoted approvingly, yet it was there held that the bursting of a boiler was a peril not within the general term "perils of the sea." In *Citizens' Ins. Co. v. Glasgow*, *supra*, it seems that the policy was the same as in the Ohio case.

In all the cases cited it was held simply that the loss was one which came within the insurance clause providing against "all other perils, losses," etc. In the case before us the general clause is, "and all other losses and misfortunes that shall come to the hurt, damage, or detriment of the said vessel, or any part thereof, to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by this policy."

Our conclusion is, that the loss complained of herein is not within either the meaning of the term "perils of the sea" as defined in our Civil Code or as understood in the law of marine insurance generally; and of course, if the loss be one which falls under the general clause of the policy, it is sufficient to say that there is no allegation that, by the customs of insurance in San Francisco, insurers are liable for explosions of boilers or damages resulting therefrom.

2. The construction we place upon the clause of the policy above quoted renders it unnecessary to consider whether the

damages are not in any event excepted under that provision of the policy relating to the bursting of boilers. It is proper to say, however, that a clause precisely the same in language was considered by the court of appeals in *Strong v. Sun Mut. Ins. Co.*, 21 N. Y. 103; 88 Am. Dec. 242. It was there held that the language is to be understood to mean that the company is not to be liable for damage resulting to the vessel, or otherwise, on account of the bursting of the boilers, unless occasioned by stranding.

Judgment affirmed.

MARINE INSURANCE — PERILS OF THE SEA. — Perils of the sea, doctrine of discussed and explained in elaborate note to *Van Horn v. Taylor*, 7 Rob. 201; 41 Am. Dec. 282. Loss from explosions of boilers is covered by policy of marine insurance: *Perrin v. Protective etc. Co.*, 11 Ohio, 147; 38 Am. Dec. 728. Dangers of navigation mean those perils that are incident to it in a lawful course of navigation, but not those arising from pursuing an unlawful course: *Atwood v. Reliance etc. Co.*, 9 Watts, 87; 34 Am. Dec. 503. Dangers for which insurer of goods is liable must be such as arose from some extraordinary disaster occurring on the voyage, against which human skill and foresight could not guard: *Fleming v. Marine Ins. Co.*, 3 Watts & S. 144; 33 Am. Dec. 747. Compare also *Dupeyre v. Western etc. Co.*, 2 Rob. (La.) 457; 38 Am. Dec. 218; *Cudworth v. South Carolina Co.*, 2 Rich. 416; 35 Am. Dec. 692; *McDowell v. General etc. Ins. Co.*, 7 La. Ann. 684; 56 Am. Dec. 619.

THOMPSON v. WILLIAMS.

[76 CALIFORNIA, 153.]

CORPORATIONS — NOTICE OF MEETINGS OF DIRECTORS — Each director must, under the provisions of the Civil Code of California, have special notice of the regular meetings of the board, unless provision is made in the by-laws for such meetings.

CORPORATIONS — NOTICE OF ADJOURNED MEETING OF THE DIRECTORS. — If a regular meeting of the board of directors, of which no notice is required, is adjourned to the next day, but the hour to which it is thus adjourned is not stated, and two directors are not present at such regular meeting, and no notice is given of the adjourned meeting, and these two directors have no knowledge of it, an assessment levied at such adjourned meeting is a nullity.

ACTION to enjoin the sale of shares of corporate stock for an alleged assessment thereon. The assessment was claimed to be void, for the following causes: Prior to October 8, 1883, the office and place of business of the corporation was at 414 O'Farrell Street, San Francisco. The by-laws provided for regular meetings of the board of directors the second Monday in October of each year, without notice; on that day (which

fell on the 8th of the month), three of the five directors, constituting the board, met at the regular place of meeting, and resolved to change the office to 314 Mission Street, and adjourned to meet at the new place of meeting on October 9th, but without fixing any hour. The three directors present at the regular meeting met on the day following, at 314 Mission Street, and there levied the assessment in question. Judgment for plaintiff.

Estee and Wilson, and James Wheeler, for the appellant.

Coudery and McCutchen, for the respondent.

THORNTON, J. Each director must have special notice of the regular meetings of the board of directors of the corporation defendant, unless provision is made in the by-laws for such meetings: Civ. Code, sec. 320. Conceding that the provision in the by-laws was sufficient to give notice to the directors of the regular meeting of the 8th of October at 414 O'Farrell Street, and that the removal of the office resolved at that meeting to 314 Mission Street was valid, still, as it does not appear that the hour of the day on the 9th of October on which the adjourned meeting was to be held on the last-named day was fixed at the meeting of the 8th, and no notice of such adjourned meeting was given the directors Allen and Thompson, who were not at the meeting on the 8th, we must hold the assessment levied at the meeting on the 9th was levied substantially without notice and without authority. To hold that the adjourned meeting of the 9th, the hour of which was not fixed or declared by the meeting of the 8th of October, was a part of the meeting of the board of the 8th, and therefore no further notice of it was required, would be to sanction an evasion of the law in regard to notice to the directors of the meeting of the board. An inspection of the minutes of the meeting of the 8th would give no information to the directors not attending that meeting of the time to which that meeting had been adjourned. In fact, it does not appear that the board as a board ever did fix the hour on the 9th at which the adjourned meeting was to be held; and as it does not so appear, we must, in construing the facts as found, hold that the board on the 8th did not fix the hour at all. Under these circumstances, we cannot hold that the meeting on the 9th, at which the assessment was levied, was anything more than a special meeting, of the calling of which the non-attending directors, Allen and Thompson, had no notice or

knowledge of any kind. The assessment was therefore levied without authority, and was a nullity: See *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534. The judgment must be affirmed.

So ordered.

CORPORATIONS—DIRECTORS' MEETING, NOTICE OF: *Chase v. Tuttle*, 55 Conn. 455; 3 Am. St. Rep. 64, and note 69.

TURNER v. McDONALD.

[76 CALIFORNIA, 177.]

PERFECT TITLE MUST BE ONE THAT IS GOOD AND VALID BEYOND ALL REASONABLE DOUBT. Though the court may entertain an opinion in favor of the title, yet if it be satisfied that that opinion may fairly and reasonably be questioned by other competent persons, it will refuse specific performance.

TITLE TO BE GOOD should be free from litigation, palpable defects, and grave doubts, and should consist of both the legal and equitable title, and be fairly deducible of record.

DEED ABSOLUTE, INTENDED AS A MORTGAGE, does not in California transfer title as between the parties to it.

PURCHASER OF REAL ESTATE IS ENTITLED TO WITHDRAW HIS DEPOSIT and terminate his contract, where it calls for a perfect title, and the title of the vendor depends upon a deed executed by an attorney in fact, whose power of attorney was made prior to the acquisition of his principal's title, and upon a conveyance from a devisee, and the will under which such devisee claims has never been admitted to probate in this state.

ACTION to recover back a sum of money paid upon a contract for purchase and sale of real estate. Judgment for the plaintiff.

James A. Waymire, for the appellant.

Edward P. Cole, for the respondent.

BELCHER, C. C. On the nineteenth day of February, 1879, the defendant contracted to sell to one Woodworth a lot in the city of San Francisco for twenty thousand five hundred dollars, and received from him on account, and as a deposit to secure the sale, the sum of five hundred dollars. The contract was made "upon the following terms, to which both parties are mutually bound: Ten days are to be allowed for legal search of title. If it is not found to be perfect, the deposit, for which this is a receipt, is to be returned; if the title

is found perfect, and the sale is not consummated in accordance with the above terms, the deposit is to be forfeited."

Within the ten days allowed, Woodworth submitted an abstract of title to John R. Jarboe, an attorney at law, for examination, and was ready and willing to complete the purchase if Jarboe pronounced the title good. After examination, Jarboe decided that the title was not perfect, and he informed defendant of his decision about the time it was made. Woodworth then demanded from the defendant a return of his deposit, and the defendant refused and neglected to pay back the money, but did not, so far as appears, offer or tender to him any deed of the property.

Woodworth assigned his claim to the plaintiff, and this action was brought to recover back the five hundred dollars, with interest.

The court below gave judgment for the plaintiff, and the defendant appealed.

In support of the appeal, it is urged that the defendant's title was in fact perfect, and the court should have so found from the evidence.

A perfect title must be one that is good and valid beyond all reasonable doubt. Whether the title in particular cases is good or not is a question which it is often difficult to determine, and one upon which lawyers and judges sometimes disagree. "Though the court," it has been said, "may entertain an opinion in favor of the title, yet if it be satisfied that that opinion may fairly and reasonably be questioned by other competent persons, it will refuse specific performance. Thus in a case before Sir John Leach, he expressed the strong inclination of his opinion to be in favor of the title, and yet refused the relief sought by the plaintiff; and in the recent case of *Pyrke v. Waddingham*, in which the Vice-Chancellor Turner discussed the subject now before us, he expressed an opinion in favor of the title, but nevertheless dismissed the vendor's bill, with costs. Still less, of course, will the court force a title on a purchaser in opposition to the decision of another court, though it may think that decision to be wrong": Fry on Specific Performance, sec. 579; see also *Richmond v. Gray*, 3 Allen, 25; *Sturtevant v. Jaques*, 14 Allen, 523.

It was shown on the trial that the title to the lot in controversy here was, in January, 1855, in one Stevens, and that on the eighth day of that month he mortgaged the lot to one Charles S. Tripler. The mortgage was by a deed absolute in

form. On the third day of December, 1862, Tripler executed a power of attorney to one Abell, giving him power to sell any real property which he (Tripler) then owned, or was interested in, in the state of California. On the 20th of December, 1862, Tripler commenced suit to foreclose his mortgage, and on the 10th of July, 1863, he bought in the property under his decree of foreclosure. On the 8th of October, 1863, Tripler, by Abell, his attorney, made a quitclaim deed of the lot to Hutchinson, defendant's grantor. On the 13th of January, 1864, Tripler received his sheriff's deed. Some time in 1866 Tripler died in the state of Michigan, leaving a last will, by which he gave all his property to his surviving wife, Eunice Tripler, "in confident expectation that the same will be expended in her own comfortable support, and in the education and maintenance of our children, leaving it entirely discretionary with her to make such provision for our children as she, in the exercise of her judgment, may deem best." While the will speaks of the children, it nowhere gives the names, ages, or number of them. The will was admitted to probate in Michigan, but was never probated in this state, and there was no proof as to whether there were any debts against the estate here or not. In March, 1869, Eunice Tripler executed a quitclaim deed of the lot to defendant's grantor.

It is admitted that a title to be good "should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record."

Upon the showing made, it seems to us that defendant's title was not free from grave doubts as to its sufficiency. When Tripler made his power of attorney to Abell he did not own and had no legal interest in the lot. It is settled law in this state, that a deed absolute, if intended as a mortgage, does not transfer title between the parties to it: *Cunningham v. Hawkins*, 27 Cal. 606; *Taylor v. McLain*, 64 Id. 514; *Healy v. O'Brien*, 66 Id. 519; Code Civ. Proc., sec. 744, which is the same as section 260 of the old Practice Act. But if Tripler had no interest in the lot when he made his power of attorney to Abell, can it be said, beyond doubt, that the deed afterwards made by the attorney conveyed any interest therein?

Again, when one dies leaving property in this state, that property must be disposed of according to the laws of this state. And if he left a will, that will must be proved here before it can affect property situated here. Now, can it be

said, beyond doubt, that Mrs. Tripler could convey by quit-claim deed a good title to the lot in question before the will, under which she claimed it, was produced and proved here?

It seems to us that these questions must be answered in the negative, and that it must follow, therefore, that defendant's title was not "fairly deducible of record."

There is no other question requiring special notice. We find no error in the record, and therefore advise that the judgment and order be affirmed.

HAYNE, C., and FOOTE, C., concurred.

The COURT.— For the reasons given in the foregoing opinion, the judgment and order are affirmed.

SALE OF REALTY. — Either party has the right to withdraw from pending negotiations for sale of realty, where no consideration has passed, no rights intervened, and the condition of the parties has not changed: *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814.

PAROL TESTIMONY TO VARY DEED ABSOLUTE ON ITS FACE. — Terms of deed absolute on its face cannot, in suit at law, be varied by parol, so as to make it operative only as a mortgage: *Bragg v. Massie's Adm'r*, 38 Ala. 89; 79 Am. Dec. 82. Where written contract is perfect upon its face, parol evidence cannot be introduced to add to, alter, or vary its terms: *Looney v. Rankin*, 15 Or. 617; *Bruce v. Stemp*, 82 Va. 352. Where the terms of a contract are in writing, oral evidence of what the parties intended is not admissible: *Beezley v. Crassen*, 16 Or. 72. Contemporaneous parol agreement is not admissible to vary the effect of a blank indorsement of a negotiable promissory note: *Knoblauch v. Foglesong*, 38 Minn. 352. But parol testimony is admissible to prove the contents of lost or destroyed records: *Motley v. Watts*, 98 N. C. 284. Where law requires records of proceedings to be kept, they are the only lawful evidence of the action to which they refer, and such record cannot be contradicted, added to, or supplemented by parol: *People v. Madison*, 125 Ill. 335. Parol evidence is not admissible to modify or explain a promissory note: *Richie v. Frazer*, 50 Ark. 393. It is competent for a witness who saw an original survey made, on an issue involving the location of a line on the ground, to testify to what the surveyor did in running the lines, though he reversed the result called for in the field-notes: *Smith v. Leach*, 70 Tex. 493.

DEED ABSOLUTE ON FACE, WHEN MORTGAGE. — Transfer intended as security is a mortgage: Note to *Ryan v. Dox*, 90 Am. Dec. 709. A deed absolute on its face given to secure the payment of a promissory note is a mortgage: *Raynor v. Drew*, 72 Cal. 307. Compare *Warder v. Enslin*, 73 Id. 291. A deed absolute on its face, intended only as security, is mortgage: *Helm v. Boyd*, 124 Ill. 370. A deed absolute on its face may be shown to be defeasible by parol upon adequate proof: *McMillan v. Bissell*, 63 Mich. 66. Compare *Cullen v. Carey*, 146 Mass. 50. An absolute deed for realty executed solely to secure debt to the vendee will be treated in equity as a mortgage: *Robinsons v. Lincoln etc. Bank*, 85 Tenn. 363; *McMillan v. Jewett*, 85 Ala. 476.

HOBSON v. HASSETT.

[76 CALIFORNIA, 203.]

AGENT IS PERSONALLY LIABLE ON A NOTE SIGNED IN HIS NAME, though he adds thereto the designation "agent," unless from some portion of the note or the paper upon which it is written the name of his principal appears.

CONSIDERATION. — Note of the president of corporation, binding upon him personally, is not without consideration if made for the purpose of taking up a note of the corporation which is at the time surrendered and canceled.

Rutledge and McConnell, for the appellant.

Vaughn and Cradlebaugh, and *G. A. Johnson*, for the respondent.

BELCHER, C. C. This action was brought to recover the amount due on a promissory note which reads as follows: —

“September 7, 1881.

“\$1,135. One day after date, without grace, we promise to pay A. D. Hobson or order the sum of eleven hundred and thirty-five dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin, at the rate of ten per cent per year from date until paid.

A. HASSETT, President.”

The court below found that prior to the year 1878, the Grangers' Business Association of Healdsburg was duly organized as a corporation, and has existed as such ever since; that on the eighth day of January, 1878, the said corporation became indebted to the plaintiff in the sum of two thousand dollars, and on that day made and delivered its promissory note to plaintiff for that amount; that on the seventh day of September, 1881, plaintiff presented this note to one Bagge, who was the book-keeper and accountant of the corporation, for payment, and requested that the corporation pay him nine hundred dollars in cash, and give him a new note for the balance; that defendant Hassett was president of the corporation at that time; that Bagge paid the nine hundred dollars, and drew a new note for the balance, and requested defendant, as president of the corporation, to sign it, which defendant intended to do, but signed only his own name, adding thereto the word "president"; that the note so executed is the note set out in the complaint; that defendant and Bagge only intended to make and deliver the note of the corporation, and did not then or at any other time say or do anything to lead

plaintiff to believe that defendant intended to make or deliver his own note, and not the note of the corporation; that plaintiff could not read writing, and did not at the time know in what manner the note was executed, but at the end of every month, for eighteen months thereafter, he presented it, and received from the corporation the interest due thereon, and never claimed or demanded from defendant the payment thereof prior to the bringing of this action.

Upon these facts the court found, as a conclusion of law, that the note was the note of defendant, and not of the corporation, and thereupon judgment was entered in favor of the plaintiff. The defendant appealed, and the case comes here on the judgment roll.

The principal contention of the appellant is, that the note was the note of the corporation, and not of the defendant, and that the court erred in its conclusions of law to the contrary.

In view of the large number of adjudicated cases, it is sometimes difficult to determine whether a note or bill of exchange, drawn by an agent, but for the use and benefit of his principal, binds the agent personally or not. There are, however, some general rules upon the subject, which seem to be well settled. Judge Story says: "When, upon the face of the instrument, the agent signs his own name only, without referring to any principal, then he will be held personally bound, although he is known to be or avowedly acts as agent": Story on Promissory Notes, sec. 68. But "if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed": Id., sec. 69.

Professor Parsons says: "If an agent make a note in his own name, and add to his signature the word 'agent,' but there is nothing on the note to indicate who is principal, the agent will be personally liable, just as if the word 'agent' were not added": 1 Parsons on Notes and Bills, p. 95. And "one who puts his name on negotiable paper will be liable personally, as we have seen, although he acts as agent, unless he says so, and says also who his principal is; that is, unless he uses some expression equivalent, to use Lord Ellenborough's language, to, 'I am the mere scribe.' For if the construction may fairly be that while he acts officially, or at the request of others, yet what he does is still his own act, it will be so interpreted": Id., p. 102; and see also *Sayre v. Nichols*, 5 Cal. 487;

Stackpole v. Arnold, 11 Mass. 27; 6 Am. Dec. 150; *Williams v. Robbins*, 16 Gray, 77; 77 Am. Dec. 396; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Sturdivant v. Hull*, 59 Me. 172; 8 Am. Rep. 409; *Pentz v. Stanton*, 10 Wend. 271; 25 Am. Dec. 558; *Powers v. Briggs*, 79 Ill. 493; 22 Am. Rep. 175.

The cases cited by appellant are not in conflict with the rules above stated. In *Farmers' and Mechanics' Bank v. Colby*, 64 Cal. 352, the note was signed by "G. A. Colby, Prest. Pac. Peat Coal Co., D. K. Tripp, Sec. *pro tem*." It was indorsed by Colby and four others. The action was against Colby and Tripp as makers, and the other defendants as indorsers. The court said: "Read as a whole, we think it apparent from its face that it is the note of the company indorsed by the individuals."

In *Bean v. Pioneer Mining Co.*, 66 Cal. 451, 56 Am. Rep. 106, the note was signed "Pioneer Mining Company, John E. Mason, Supt." The plaintiff sought to hold Mason personally responsible on the note, but the court considered him not bound. The court said: "The signature is not John E. Mason, Superintendent of the Pioneer Mining Company," the last portion of which, in the absence of any words in the body of the note indicating an intention that it should be an obligation of the company, might, it is claimed, be held to be merely *descriptio personæ*. But here the words 'Pioneer Mining Company' precede the name 'John E. Mason.' "

In *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326, the question was, whether a certain act done by the cashier of a bank was done in his official or individual capacity. The action was based upon a check, and the court said: "But the fact that this appeared on its face to be a private check is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual, transaction; to which must be added the circumstance that the cashier is the drawer, and the teller the payee; and the form of ordinary checks deviated from by the substitution of 'to order,' or 'to bearer.' The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction."

In *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360, the action was on a check having the words "Ætna Mills" printed in the margin, and signed "J. D. Farnsworth, Treasurer." The court said "that this check manifests upon its

face that the writing is the act of the principal, though done by the hand of an agent; or in other words, that it is the check of the Ætna Mills, executed by Farnsworth as their treasurer and in their behalf."

The other cases cited do not need special notice.

In the light of the rules of law above announced, the question then is, Did the defendant, by signing the note as he did, make himself personally responsible for its payment? It seems to us that there can be but one answer to this question, and that is, that he did. There is nothing on the face of the note to show that there was any principal back of the defendant. He signed his own name, and wholly failed to indicate, if he had a principal, who or what the principal was. The word "president," which he added to his name, must, therefore, be regarded as a mere *descriptio personæ*.

It is further contended that, as the promissory note of the defendant, it was without consideration. We do not think this position can be maintained. The note imports a consideration, and it must be presumed that when the old note was paid it was given up, and the new one taken in its place. The old note was a sufficient consideration for the new one.

We think the court drew correct conclusions from the facts before it, and therefore advise that the judgment be affirmed.

HAYNE, C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

AGENCY — AGENT WHEN PERSONALLY LIABLE. — Agent is personally liable on contract signed in his own name as agent, if principal's name does not appear in the instrument of writing as such: *Tannatt v. Rocky Mountain etc. Bank*, 1 Col. 278; 9 Am. Rep. 156, and note; *Bryson v. Lucas*, 84 N. C. 680; 37 Am. Rep. 634, note. "One year after date, we promise to pay to order of A B \$1,000, value received," signed, "G. M., treasurer, etc.," is the note of M., not of the association: *Mellen v. Moore*, 68 Me. 390; 28 Am. Rep. 77; *Sturdivant v. Hull*, 59 Me. 172; 8 Am. Rep. 409; *Buckingham v. Brewster*, 79 Ill. 515; 22 Am. Rep. 177. Word "agent" appended to name of agent designates capacity in which he acts, and is not mere *descriptio personæ*: *Sayre v. Nichols*, 7 Cal. 535; 68 Am. Dec. 280. One acting as agent for undisclosed principal may be treated as principal: *Welsh v. Goodwin*, 123 Mass. 71; 25 Am. Rep. 409. Charging principal's debt to agent does not preclude creditor from afterwards asserting claim against the principal: *Guest v. Burlington etc.*, 74 Iowa, 457.

SPARROW v. RHOADES.

[76 CALIFORNIA, 208.]

EJECTMENT — EVIDENCE ADMISSIBLE UNDER THE GENERAL DENIAL. — The defendant may, under the general denial in ejectment, introduce any evidence tending to defeat the plaintiff's title, and may, therefore, under such denial, show that the deed under which plaintiff claims is void because made in violation of the statutes of the United States concerning the disposal of public lands.

EJECTMENT for two tracts of land. To sustain his action, plaintiff offered and the court received in evidence two deeds executed by the defendant, and purporting to convey those tracts. To show that these deeds were inoperative and void, the defendant introduced evidence tending to show that they were made under the following circumstances: The defendant, having perfect title to one of those tracts, agreed to sell it to plaintiff for one thousand dollars, the payment of which was to be made in the following manner: Plaintiff paid three hundred dollars in cash, and he agreed that he would enter into possession of the other tract of land, which was then a part of the public domain of the United States, and would proceed to acquire title thereto under the pre-emption laws, and that when such title was procured, he would convey it to the defendant, and such conveyance should be regarded as in payment of the remaining seven hundred dollars due on the purchase-money of the other tract. The trial court held that as the consideration of the deeds was entire, and in part illegal, they were void *ab initio*. Judgment for defendant.

Henley and Oates, and R. M. Swain, for the appellant.

George D. Collins and John A. Wall, for the respondent.

FOOTE, C. This is an action of ejectment. The court below, sitting without a jury, gave judgment in favor of the defendant, from which, upon the judgment roll only, the plaintiff appeals.

The points made for the reversal of the judgment are, that under the general denial of the answer to the allegations of the complaint, it was inadmissible to introduce any evidence to show that the consideration of the deed upon which the plaintiff based his title and right of entry was illegal and the deed void; and that the finding of the court upon such evidence was outside of the issues made by the pleadings, and should be disregarded, in which event judgment would necessarily have been given for the plaintiff.

The finding complained of, which is conceded to have been supported by sufficient evidence, is to the effect that the real consideration of the deed under which plaintiff claimed was three hundred dollars, and an agreement by the plaintiff that he would, as a pre-emptor, procure a title from the United States to a part of the land embraced in the deed, and reconvey the same to the defendant, who was in possession of it. This, of course, involved the taking of an oath required by section 2262 of the Revised Statutes of the United States, with a present intention to violate it.

Under a general denial in an action of ejectment, the defendant has a right to introduce in evidence any fact which might show or tend to show that the plaintiff had no right of entry when the suit was brought: *Kimball v. Gearhart*, 12 Cal. 50; *Bell v. Brown*, 22 Id. 672; *Willson v. Cleaveland*, 30 Id. 201; *Bell v. Bed Rock T. & M. Co.*, 36 Id. 219; *Semple v. Cook*, 50 Id. 29.

“In an action to recover possession of land, if the complaint is in the usual form, merely averring that the plaintiff is the owner in fee of the premises described and entitled to their possession, and that the defendant unlawfully withholds the same, the general denial admits proof of anything that tends to defeat the title which the plaintiff attempts to establish on the trial”: *Pomeroy's Remedies and Remedial Rights*, sec. 679.

The deed which the plaintiff introduced as the evidence of his title and right of entry to the premises of which he sought possession was void, because the statute expressly declares it to be so: R. S., sec. 2262.

Under the general denial of the answer, evidence was admissible to show that the title, which on the face of the deed appeared to have passed to the plaintiff, could not have done so, and that the deed was worthless as a muniment of title, or as that under which a right of entry accrued to the plaintiff, even although the fact that the deed was void by reason of an illegal consideration was not set up by special plea in confession and avoidance.

The general denial of the defendant was in effect that he denied the plaintiff's title and right of entry, the proof to sustain which was, that the deed under which the plaintiff claimed was in fact no deed at all, — of no more value to convey title than a piece of blank paper, and utterly valueless as evidence of title.

The result of showing that the plaintiff's deed from the defendant was void was to prove title in the defendant, and this has been held to be admissible under the general denial in *Marshall v. Shafter*, 32 Cal. 177.

The proof went to show directly that the plaintiff's claim of title to and right of entry upon the land in the possession of the defendant was and is without merit.

It is not evidence merely to support a special plea of confession and avoidance; it is evidence which tends absolutely to contradict the fact that the plaintiff is entitled to the possession of the premises.

It is not an effort to show that notwithstanding the plaintiff may have had the right of entry under that deed, he has by some other independent and separate line of inequitable conduct lost it; it is an effort to show that he never had any right of possession at all.

If the evidence was admissible, the court did right in making a finding thereon, and the judgment should be affirmed.

HAYNE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

EJECTMENT. — UNDER THE CODE, DEFENDANT may avail himself of any legal or equitable defense: *Prentiss v. Breever*, 17 Wis. 635; 86 Am. Dec. 730. In Illinois the general issue only can be pleaded, but same matters may be given in evidence there as under the common-law action of ejectment: *Warren v. Jacksonville*, 50 Ill. 236; 58 Am. Dec. 610.

BLACKWOOD v. CUTTING PACKING COMPANY.

[76 CALIFORNIA, 212.]

WARRANTY, WHEN IMPLIED IN CONTRACT OF SALE. — By the code of California, "one who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so at the place of delivery as can be secured by reasonable care."

WARRANTY IS IMPLIED IN CONTRACT FOR THE SALE OF FRUIT not then in existence that it shall be sound and merchantable. Fruit must be deemed "merchandise" within the meaning of the statute providing that there shall be an implied warranty upon the part of one who agrees to sell merchandise not then in existence.

DIFFERENCE BETWEEN A SALE AND AN AGREEMENT TO SELL is that in the former case the title passes, while in the latter it does not.

TITLE IS NOT REGARDED AS PASSING UNDER A CONTRACT OF SALE when there is neither delivery of the goods sold nor payment of the purchase price, nor a waiver of such payment.

TITLE DOES NOT PASS UNDER A CONTRACT OF SALE when the goods are not in a condition in which the vendee can be called upon to accept them, and where the vendor is to do something further to the goods for the purpose of putting them into a deliverable state.

TITLE CANNOT PASS UNDER A CONTRACT OF SALE when the property sold has not been identified, nor when something remains to be done for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend upon the quantity or quality of the goods.

SALE, WHEN COMPLETE. — USE OF THE TERM "SOLD" does not conclusively indicate a consummated sale.

GOODS ARE NOT ACCEPTED so as to waive the purchaser's right to object that they are not of the quality called for by his contract merely by the receipt and retention of part of them by the purchaser, when he at the same time objects thereto, and stipulates that such receipt shall not be regarded as an acceptance.

A. A. Moore, George W. Reed, and Arthur Rodgers, for the appellant.

A. N. Drown, for the respondent.

HAYNE, C. Action for the price of apricots alleged to have been sold to defendant. Defense, the breach of an implied warranty as to quality.

The contract was in two parts. The part signed by the defendant was as follows:—

“SAN FRANCISCO, Sept. 17, 1881.

“Bought of W. C. Blackwood his crop of apricots at Haywards, for the seasons of 1882, 1883, 1884, 1885, and 1886, not less than seventy-five tons and not exceeding two hundred tons per annum, at three cents per pound, f. o. b. (free on board cars at) Haywards.

“CUTTING PACKING COMPANY,

“By A. D. CUTLER.”

The part signed by the plaintiff was similar to the above, except that it said: “Sold my crop of apricots,” and “Sold Cutting Packing Company.” The court below gave judgment for the defendant, and the plaintiff appeals.

1. The first question is, whether there was any warranty. The defendant relies upon section 1768 of the Civil Code, which is as follows:—

“Sec. 1768. One who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so at the place of delivery as can be secured by reasonable care.”

The plaintiff contends, in the first place, that apricots are not "merchandise." A walk through the markets would probably convince him that he is mistaken. It is said, however, that such fruit comes under the head of "produce." Very likely it does. But we think that the word "merchandise" is used in the above section in a large sense, and covers all kinds of personal property which is ordinarily bought and sold in the market. Whether it covers more than that need not be decided in this case. This point of plaintiff is not unlike saying that a promissory note between farmers is not a negotiable instrument, because such an instrument is a creation of the law between "merchants."

And we think, also, that the future crops of fruit come under the head of merchandise "not then in existence." Section 1770 covers the case of an article manufactured to order; and section 1771 the case of merchandise "inaccessible to the examination of the buyer," which probably refers to merchandise in existence. Taking the three sections together, we think that the one above quoted applies to a case like the present.

It is argued for the plaintiff, however, that the transaction was a sale, and not an agreement to sell, and that therefore the section does not apply.

The fundamental difference between a sale, properly so called, and an agreement to sell is, that in the former case the title passes, while in the latter case it does not. The inquiry in this regard, therefore, must be as to whether the title passed. And it is to be observed that the point of time to which the inquiry must relate in the present case is the time the contract was entered into.

Some question is made by counsel as to whether the title to a thing which is not in existence can pass. But we shall assume in favor of the plaintiff that the fruit to be produced from trees already grown and the property of the plaintiff has such a potential existence as to be the subject of sale.

It seems well settled that the question as to whether the title has passed is one as to the intention of the parties. And such intention is, as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances of the case. But in the absence of anything showing a contrary intent, there are certain circumstances which have a controlling force, and these exist in the present case.

(a) There was at the time to which the inquiry relates neither delivery of the goods nor payment of the price. The contract says that the fruit was bought "at three cents per pound, f. o. b. (free on board cars at) Haywards." This, as we construe it, is an expression of intention that the price was to be paid or to become due when the fruit was delivered to the carrier at Haywards. But the result would be the same if the words quoted do not express such an intention. For if the time of payment be left indefinite, the law implies that it is to be on the delivery of the goods: Civ. Code, sec. 1784; *Dwyer v. Duquid*, 70 Ill. 307; *Case v. Dewey*, 55 Mich. 118. In common phrase, the terms were cash on delivery. And where such is the case, the delivery of the goods and the payment of the price are conditions concurrent. And if the condition of payment is not waived, the title does not pass until the price is paid: *Peabody v. Maguire*, 79 Me. 585; *Evansville R. R. Co. v. Erwin*, 84 Ind. 464, 465; *Turner v. Moore*, 58 Vt. 456; *Adams v. O'Connor*, 100 Mass. 515; 1 Am. Rep. 137; *Hoffman v. Culver*, 7 Bradw. 454. It frequently happens that the seller will deliver the goods notwithstanding the failure to fulfill the condition of payment; and in such cases the question arises as to whether such delivery is not to be considered a waiver of the condition. Some courts hold that in the absence of circumstances showing a contrary intention the condition is waived, and that the title passes. But where, as here, there was neither delivery nor payment, there can be no doubt but that the title does not pass: *Dixon v. Duke*, 85 Ind. 435, 436.

(b) There are other circumstances which constitute more specific criteria than the above. The goods were not in a condition in which the buyer could be called upon to accept them. Benjamin gives the following rule in this regard: "Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state into which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property": Benjamin on Sales, b. 2, c. 3.

In this case the seller was to give the necessary cultivation to the orchard, pick the fruit, pack it in suitable boxes or baskets, and deliver it to the carrier at Haywards.

(c) There is yet another circumstance. The portion of the crop to be delivered had not been identified. What was con-

tracted for was to be "not less than seventy-five tons and not exceeding two hundred tons per annum." Possibly it might be argued that if any crop should turn out to be less than seventy-five tons, the buyer would not be bound to accept any portion of it. It is not necessary to consider that question. It certainly cannot be maintained that the same result would follow if the crop of any year should turn out to be more than two hundred tons. At the time of the formation of the contract (to which the inquiry must relate) it could not be known what number of tons would be produced. Even if the fruit had been then ripe and hanging upon the trees, it could not be known what portion was to go to the defendant until it was weighed.

In this regard Benjamin gives the following rule: "Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods are ascertained, and they are in the state in which they ought to be accepted": Benjamin on Sales, b. 2, c. 3.

So far as concerns the proposition that where weighing or measuring is necessary to the identification of the goods, the title does not pass until they have been weighed or measured, the American cases are generally in accord with the above rule: See *Hires v. Hurff*, 39 N. J. L. 10; *Galloway v. Week*, 54 Wis. 608; *Commercial Nat. Bank v. Gillette*, 90 Ind. 268; *Hutchinson v. Grand Trunk R'y*, 59 N. H. 489; *Fry v. Mobile Bank*, 75 Ala. 474; *Allen v. Melton*, 64 Tex. 218; *Hubler v. Gaston*, 9 Or. 66; 42 Am. Rep. 794; *Elgee Cotton Cases*, 22 Wall. 180.

In California the cases are to the same effect: See *Horr v. Barker*, 8 Cal. 608; *McLaughlin v. Piatti*, 27 Id. 463; *Caruthers v. McGarvey*, 41 Id. 15. Some of the American cases are not in accord with the rule laid down by Mr. Benjamin, in this: that if the goods are identified, it does not matter that weighing or measuring is necessary to ascertain the price or the quantity. And this seems to be the law in California. For the Civil Code contains the following: "Sec. 1140. The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

This section does not dispense with identification. On the contrary, it requires it. It only dispenses with segregation when the property is otherwise identified. Therefore, where the identification consists in the segregation, weighing, or measuring, they are still necessary. And the present case was of the latter character.

As against these controlling features of the transaction, the plaintiff has only the language of the instrument. The term "sold," it is said, indicates a consummated sale. But this word is not conclusive: *Anderson v. Read*, 106 N. Y. 344, 345. In *McLaughlin v. Piatti*, 27 Cal. 458, the agreement was, that in consideration of a certain sum, the receipt of which was recited, the owner "granted, bargained, and sold" the property to the buyer, yet it was held to be a mere agreement to sell. And in *Elgee Cotton Cases*, 22 Wall. 180, the language was even stronger.

We think, therefore, that the title did not pass, and that consequently there was no sale, but a mere agreement to sell. Hence the case falls within section 1768, and a warranty that the goods should be sound and merchantable was implied.

2. The court below found that the goods were not sound or merchantable at the place of production, etc. It is contended that this finding is not sustained by the evidence. But we think the evidence is amply sufficient.

S. Roper, who had been in the fruit business for twelve or fourteen years, and who was shown a sample, testified: "They are not really good for anything. They would not pay to dry. I suppose that animals would eat them."

John A. Emerson, who had been in the fruit and produce business for twenty years, and who had seen a portion of the crop, and was shown a sample while on the stand, testified: "A very few boxes were very good apricots, but the majority of them were very small, very inferior, something that I could not sell unless at a very low figure. . . . I should not consider those in exhibit H as merchantable."

William Jacobs, who was in the fruit business, and who had seen a portion of the fruit, testified: "They were not even fit for pie-fruit. I would not consider them fit for pulp that we squeeze into jelly. . . . I say that those apricots that I saw of the crop of 1882 would not be salable to canners in this market or anybody else."

And to the same effect was the testimony of other witnesses who were competent to give an opinion on the subject, and

who had either seen portions of the crop or were shown samples of it. The fact that most of the witnesses testified that the fruit might have been used for pie-fruit or for pulp does not help the plaintiff's case. Very inferior fruit may be used for pulp. And it was in evidence that "there is only a small quantity used by canners for pulp. Fifty tons would be enough for the whole city." And that pie-fruit is merely the inferior fruit which is found in most crops. It is not sold as such. Upon the same principle, it might be contended that if the fruit could have been fed to hogs, it had a value, and was therefore not within the warranty.

Undoubtedly the testimony of some of the witnesses was toned down on cross-examination, and some of them seem to have had an indirect interest in the question. But the question of credibility was, under our decisions, for the court below. At the very least, there was a substantial conflict in the evidence.

The fact that the orchard was properly cared for, that the trees were open to the inspection of the defendant, and that it was acquainted with the climatic conditions, etc., seem to us to be entirely irrelevant.

3. It seems to be contended, though not very strenuously, that the defendant accepted a portion of the crop, and that thereby it waived its rights in the premises. The facts in this regard are as follows: When the first shipment reached the defendant, it wrote to the plaintiff that the fruit was "by no means of proper quality, nor sound nor merchantable. Yet as these had been allowed to come to the city before we discovered their inferiority and unfitness and unmerchantable condition, and could not have been returned to you except at an entire loss to yourself, we made such disposition of them as we were able to make." Subsequently the parties entered into a written contract, whereby it was agreed that the defendant should send an agent to pick out such portions of the crop as was considered fit to be used. This contract provided that the receipt of the first shipment referred to in its letter above quoted "shall not be regarded as an acceptance, and shall not in any manner operate to waive any of the rights of said company"; and further, that the picking out and taking of such portion of the crop as should be picked out by the agent "shall not, nor shall any action hereunder, be deemed or taken to be an acceptance by said company, or a waiver, or to operate in any manner so as to affect, change, or impair the

rights, duties, or obligations of either of the parties under said first-mentioned agreement."

With reference to the remainder of the crop, the contract contained the following: "The remainder of said crop shall be forthwith picked, pitted, and dried in the sun on said premises, by said Blackwood, on his own account, and at his own cost and expense, subject to such rights or obligations with reference thereto as either party may have under said first-mentioned agreement."

The defendant sent its agent to the orchard, and he picked out all of the crop which was considered fit for use. This, together with the first shipment, amounted to eighty-nine thousand pounds, for which the defendant paid at the rate provided for by the first contract. The remainder was dried by the plaintiff, as provided by the second agreement, and the suit is for the price of such remainder at the contract rate, less what the dried fruit was sold for.

We are unable to see that there was any waiver of defendant's rights under the first agreement. It was expressly agreed that the receipt and disposal of the first shipment should not be considered an acceptance. And had it not been for the second contract, the defendant would doubtless not have taken any more of the apricots.

We therefore advise that the judgment and order denying a new trial be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

SALES OF CHATTELS — WHEN TITLE PASSES: See note to *Green v. Lewis*, 7 Am. St. Rep. 43. Sale of the crop to be raised during a certain time on a farm passes no title: *Hutchinson v. Ford*, 9 Bush, 318; 15 Am. Rep. 711; *contra*, *Everman v. Robb*, 52 Miss. 653; 24 Am. Rep. 682. Where plaintiff sold personalty to defendant, with a condition that the latter might return it within a stated time, and it appearing upon trial of action to recover price that a part of the personalty had been returned to and kept by plaintiff, and nothing more being shown, the returning of the property will be regarded as having been pursuant to the stipulation, and plaintiff cannot recover price of whole of personalty included in contract: *Smith v. Minnesota etc. Co.*, 38 Minn. 450. When a contract for sale of goods is that goods sold shall be paid for with cash or notes executed by the vendee or a third person, the sale is on condition, and until payment is made, title remains in the vendor: *Lang v. Rickmers*, 70 Tex. 108; *McRea v. Merrifield*, 48 Ark. 160; *Simpson v. Shakelford*, 49 Id. 63; *Campbell etc. Co. v. Walker*, 22 Fla. 412.

SALES OF CHATTELS — IMPLIED WARRANTIES. — In executory contract for sale of personalty, law implies warranty that articles must be of a merchant-

able quality, without express stipulation: Note to *Holloway v. Jacoby*, 6 Am. St. Rep. 739. Warranty that articles are fit for food is implied in sales by dealers for direct consumption: Note to *Hall v. Spalding*, 1 Am. St. Rep. 475. Warranty of fitness for particular purpose is implied when an article is ordered from a manufacturer for a particular purpose: Note to *Godfrey v. White* 1 Am. St. Rep. 537; *Sweat v. Shumway*, 102 Mass. 365; 3 Am. Rep. 471. *Curtis etc. v. Williams*, 48 Ark. 325. Warranty is implied in the sale of drug by a druggist: *Jones v. George*, 56 Tex. 149; 42 Am. Rep. 689. Sale of accounts implies warranty that they are genuine: *Gilchrist v. Hilliard*, 53 Vt. 592; 38 Am. Rep. 706. An implied warranty of the fitness of things sold for ordinary use does not embrace defects discoverable by ordinary care: *Hoffman v. Oates*, 77 Ga. 701.

ARENDT v. MACE.

[76 CALIFORNIA, 315.]

HOMESTEAD. — A LOT MAY PROPERLY BE INCLUDED IN A DECLARATION OF HOMESTEAD when it adjoins the lot on which the dwelling of the claimants stands, and is used for a garden by the family, and has thereon a well also used by them. The fact that the garden is not cultivated during the year in which a levy of execution is made is a circumstance entitled to but little weight.

HOMESTEAD MAY BE DECLARED ON REALTY, A PART OF WHICH IS COMMUNITY PROPERTY AND THE BALANCE of which is the separate property of the wife, if the declaration is made and filed by her.

EJECTMENT. Judgment for plaintiff.

G. W. Langan, for the appellants.

J. R. Palmer, for the respondent.

THORNTON, J. Ejectment. Judgment for plaintiff, and defendants appeal.

The action was brought to recover possession of lot 14 in block A, Pleasanton.

The plaintiff claims under a sale by the sheriff by authority of an execution issued upon a judgment recovered against John M. Mace, one of the defendants herein, and on a deed executed by the sheriff thereon.

The defense interposed was, that at the time of the levy and sale by the sheriff, lot 14 was the homestead of defendants, who were then husband and wife.

The court found against this defense, and defendants here contend that the evidence is insufficient to sustain the decision, and that the lot in controversy was the homestead of the defendants at the time above stated.

Lots 14 and 15 adjoined. A witness testifies "that when

he was on the lots with the sheriff (which was when the levy was made) there was a fence all around the two lots except around the front of lot 15." This witness also says: "When I was there with the sheriff, I should judge that the house [the reference here is to the dwelling-house of defendants] was two or three feet from the fence between 14 and 15. . . . Previous to that time there was a fence between 14 and 15, but Mr. Mace had taken away a section of it when he was going to move the house right on it." He says also that the lot was used as a garden lot by Mace; that he raised potatoes, a few trees, and garden vegetables on it.

Mace testifies that when the homestead was filed, he and his wife were residing on lots 14 and 15; that part of the house was on lot 14; that lot 14 was used for garden purposes, for the purposes of the family; that he had a pump standing right in the center of lot 14. This pump was used to pump water on lot 14 from a well on lot 15. In 1881 he put a fence all around lot 14, and raised potatoes and all kinds of vegetables on it for their own use.

Mrs. Mace testified that lot 14 was used for a garden "for vegetables, potatoes, and fruit." She also testifies to the pump on lot 14, put there for the purpose of irrigating. The well was on lot 15, and there were pipes from the well on 15 to the pump on 14; that the pump was put on 14 for the purpose of watering the garden, and for the convenience of the house and kitchen; that they got the water from this pump to use in the house in which they lived. She further states that when the homestead was filed by her on the 10th of March, 1882, there was a fence all around lots 15 and 14; "they were both inclosed in one fence."

We think the above uncontradicted evidence shows that lot 14 was a part of the homestead of defendants when the levy and sale above mentioned were made by the sheriff.

Plaintiff's counsel lays much stress on the circumstance that no vegetables were raised on lot 14 in the year 1882, in which the levy and sale were made. We think this immaterial, in view of the fact of the use of the lot for other purposes. The pump from which water was procured for use by the family was on the lot, and there were trees growing on it, — fruit-trees, we infer, from the testimony of Mrs. Mace. It is clear that this lot was used with lot 15 by the family. If a lot had been used as this one had been, for a year or two just prior to the filing of the homestead, for a garden, the cir-

cumstances that vegetables were not grown on it during the year in which the filing was made would, in our judgment, be entitled to but little weight on the question whether such lot, after the filing, constituted a part of the homestead, especially where other uses of the lot are shown.

When the homestead filing was made, lot 15 was the separate property of the wife, and lot 14 was common property, and it is argued by plaintiff that a valid homestead could not be created on land a part of which was the separate property of the wife and the other part common property.

The statute provides that "if the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or with the consent of the wife from her separate property": Civ. Code, sec. 1238.

In this case the filing was by the wife, and such filing by her must be regarded as a consent to the filing on her separate property. Under the statute she can certainly create a homestead on her own or separate property.

We see no valid reason why a homestead cannot be created on a lot of land consisting in part of separate and in part of common property, as was done in this case.

We do not intend by what is said above to hold that a husband can, by adopting the course pursued in this case, create a homestead on the separate property of the wife.

In accordance with the foregoing, the judgment and order must be reversed, and the cause remanded for a new trial.

So ordered.

HOMESTEAD.—IN WHAT PREMISES MAY BE ACQUIRED: Note to *Heilbron v. Fowler etc. Co.*, 7 Am. St. Rep. 183. An insolvent debtor, who at the time of making an assignment for the benefit of creditors has a homestead in which his family resides, cannot afterwards claim homestead rights in another piece of property, which he has begun to improve with a view to making it a home, but which he did not occupy as such at the time of the assignment: *Archibald v. Jacobs*, 69 Tex. 248. Where a debtor occupying two tracts of land as a homestead executes a mortgage upon one of them, and occupies as a homestead the other tract of greater value than one thousand dollars, upon which is situated the dwelling-house, he thereby elects to claim as his homestead the tract not mortgaged, and cannot afterwards claim as his homestead the mortgaged tract upon the ground that the mortgage contains a release by the wife of her dower only: *Hayden v. Robinson*, 83 Ky. 615. The fact that the wife has not lived on the place occupied and dedicated by the husband as a homestead cannot render it less the homestead of the family: *Moore v. Wills*, 69 Tex. 109. Tenant in common is entitled to homestead in common estate, and such estate is not confined to an undivided interest in two hundred acres in the entire tract: *Lewis v. Sellick*, 69 Tex.

379. Naked possession of land for ten years of the character prescribed in the ten years' statute of limitations invests the possessor with a title as absolute as if it had been acquired by patent from the state, and on which he may claim homestead: *Bridges v. Johnson*, 69 Tex. 714. Where a debtor sold his homestead in Kentucky and removed to Oregon, where he invested the proceeds in another homestead and resided there seven years, and then sold Oregon homestead and returned to Kentucky and again invested proceeds in homestead there, the last homestead is not exempt from debt created while the debtor owned first homestead in Kentucky: *Caldwell v. Seivers*, 85 Ky. 38. One who becomes a householder or head of a family after a judgment lien has been fastened on his land is not entitled to a homestead in the land paramount to that lien until its discharge: Code 1873, c. 183, sec. 5; *Kennerly v. Swartz*, 83 Va. 704. Where a fraudulent conveyance of property is subsequently annulled at the suit of the creditor, the grantor is not estopped as against the creditor to assert his right to homestead in said property: *Hatcher v. Crews*, 83 Va. 371. Wife cannot assert her claim to homestead in lands of husband which have been sold under execution for his debts, where, after such sale, she joined in conveying other lands owned by him worth more than one thousand dollars, on which they resided: *Rayburn v. Norton*, 85 Tenn. 351. Whatever rights result to one who, in the terms of the law, made application for a homestead donation of public domain, are lost by a failure to occupy it: *Garrett v. Weaver*, 70 Tex. 463. A man owning and occupying with his family a four-acre lot in a village, and conducting thereon a hotel business, and owning and cultivating seventy-four acres of land separated from such lot only by a railroad right of way and depot grounds, may hold both parcels of land as a homestead, if their united value does not exceed two thousand dollars: *Parisot v. Tucker*, 65 Miss. 439. Where at the time of the rendition of a judgment against a party, he was occupying, as his homestead, four contiguous lots, inclosed together, not exceeding in value one thousand dollars, they will be exempt from sale under such judgment, he continuing to occupy the same and being the head of a family: *Boyd v. Fullerton*, 125 Ill. 437. Where the head of a family has sold his homestead, and secured another lot of ground and erected thereon a building, with the manifest intention of making it a homestead, and actually does move upon it within a reasonable time, and its value does not exceed one thousand dollars, he will be protected against a judicial sale thereof upon an intervening judgment: *Id.* Homestead right to the whole of one hundred and sixty acres of land is not destroyed by the grant of a right of way through it to a railroad company, a part of which is an absolute grant, and partly the creation of an easement. Such conveyance does not operate to so divide the tract as to make the land only on one side of right of way subject to the homestead right: *Allen v. Dodson*, 39 Kan. 220. Homestead is not exempt from judgment rendered against owner before the acquisition of the homestead: *Peterson v. Little*, 74 Iowa, 233.

SANTA CLARA VALLEY MILL AND LUMBER COMPANY v. HAYES.

[76 CALIFORNIA, 387.]

CONTRACT IN RESTRAINT OF TRADE. — A contract entered into between persons who are engaged in the manufacture of lumber, whereby one of them agrees to make and deliver, during a certain year, a certain quantity of lumber, and not to manufacture any lumber to be sold to any other person within four counties named, and to pay a certain sum per thousand for any lumber manufactured and sold to any other person, is in restraint of a trade, against public policy, and void, where it appears that the contract was entered into for the purpose of limiting the supply of lumber, and increasing the price thereof, and giving one of the contracting parties the control of all lumber manufactured near a particular town in the year designated, and to control the supply of lumber for that year in the counties mentioned in the contract.

AN ILLEGAL CONTRACT IS ABSOLUTELY VOID, both at law and in equity. It creates no obligation between the parties, and cannot form the basis of judicial proceedings.

ILLEGAL CONTRACTS, INSTANCES OF. — Among contracts illegal under the common law, because opposed to public policy, are contracts in general restraint of trade, — contracts between individuals or private corporations which keep up the price of articles of utility.

ILLEGAL CONTRACT CANNOT BE DIVIDED AND HELD VALID IN PART when the inducement thereto and the sole object in view was the formation of an unlawful combination, which cannot be separated from the other parts of the contract and leave any subject-matter capable of enforcement.

Charles F. Wilcox, Thomas H. Laine, and Charles B. Younger,
for the appellant.

A. E. Bolton and J. A. Barham, for the respondents.

SEARLS, C. J. This is an action to recover ten thousand dollars for a breach of a contract entered into between plaintiff, a corporation, and defendants, who were engaged in the manufacture of lumber near Felton, in the county of Santa Cruz, whereby the latter agreed to make and deliver to the former, during the lumber year of 1881, two million feet of lumber at eleven dollars per thousand feet. Defendants agreed not to manufacture any lumber to be sold during said period, in the counties of Monterey, San Benito, Santa Cruz, or Santa Clara, except under the contract, and to pay plaintiff twenty dollars per thousand feet for any lumber manufactured and sold to parties other than plaintiffs. Defendants failed to comply with the contract; hence this action.

The court finds that plaintiff was the owner of three saw-mills near Felton, and that various other parties were likewise owners of similar mills in the same vicinity.

That for the purpose of limiting the supply of lumber and increasing the price thereof, a plan was devised by which plaintiff was to lease all the mills for the year 1881, where such leases could be obtained, and where that could not be done, to contract with the parties owning mills and not willing to lease, by contracts similar to the one entered into with defendants; that during the year 1881 plaintiff should shut down two of its own mills, and also as many of the mills by it leased as might seem necessary in order to limit the supply of lumber in the four counties hereinbefore named; that this contemplated scheme was carried out, including the contract with defendants as a part thereof.

That the sole and only object, purpose, and consideration upon the part of plaintiff in entering into these contracts was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount to be manufactured, and giving plaintiff the control of all lumber manufactured near Felton for the year 1881, and control of the supply of lumber for that year in the counties mentioned.

That the direct effect of this was, no wholesale market for lumber at Felton, and dealers could not purchase in any considerable quantity during 1881.

The court further found that the contract was against public policy, and that plaintiff was not damaged, etc.

Was the contract with defendant in contravention of public policy? The general rule is, that an illegal contract is absolutely void, and cannot form the basis of judicial proceedings. This is equally so in law and equity. The illegality vitiates the contract between the immediate parties, as well as in respect to third parties.

A contract tainted with the vice of illegality creates no obligation, not because of the rights of the parties to it, but because the public is interested. In case of fraud or mistake, the wrong is usually personal to the injured party, and may be waived. In cases of illegality, the wrong is far-reaching,—is done to society. This illegality may be in the consideration or in the promises and stipulations of the agreement.

Among the contracts illegal under the common law, because opposed to public policy, were contracts in general restraint of trade; contracts between individuals, to prevent competition and keep up the price of articles of utility: *Pomeroy on Contracts*, sec. 283; *Jones v. Caswell*, 3 Johns. Cas. 29; 2 Am. Dec.

134; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Id. 444.

The case of *Arnott v. Pittston and Elmira Coal Co.*, 68 N. Y. 559, 23 Am. Rep. 190, is in most respects similar to the case at bar. Arnott, the plaintiff, brought the suit as the assignee of the Butler Colliery Company, which company and defendants were corporations engaged in the business of mining and vending coal at or near Pittston, Pennsylvania. Defendant also had a depot for coal at Elmira, New York, and was there engaged in vending coal, the product of the Pittston mines, to a large extent of country north and west of Elmira.

Defendant entered into a contract with the Butler Colliery Company, by which said defendant agreed to take all the coal the Butler company desired to send north of the state line, not exceeding two thousand tons per month, and the Butler Colliery Coal Company on its part agreed not to sell coal to any other party except defendant, to go north of the state line (between New York and Pennsylvania) during the continuance of the agreement.

The Butler company sold coal during the term covered by the agreement to parties other than the defendant, and having delivered to defendant under the agreement coal which the latter refused to pay for, the action was brought to recover for the coal so delivered under the agreement.

It appeared that defendant had made similar contracts with all the other mining proprietors of Pittston, and that the object was to so control the shipment and supply of coal for the Elmira market as to maintain an unnaturally high price for coal in that market, and to prevent competition in the sale of coal therein.

The court in considering the appeal said: "That a combination to effect such a purpose is inimical to the interest of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be a question of this day: Cites *Morris Run C. Co. v. Barclay C. Co.*, 38 Pa. St. 173; *People v. Fisher*, 14 Wend. 9; 28 Am. Dec. 501; *Stanton v. Allen*, 5 Denio, 434; 49 Am. Dec. 282; *Saratoga Co. Bank v. King*, 44 N. Y. 87. Every producer or vender of coal, or other commodity, has the right to use all legitimate efforts to obtain the best price for the article in which he deals; but when he endeavors to artificially enhance prices by suppressing or keeping out of market the produce of others, and to accomplish

that purpose by means of contracts binding them to withhold their supply, such restraints are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy, and illegal. . . . Parties entering into contracts of this description must depend upon each other for their execution, and cannot derive any assistance from the courts, and the contract was held void." *Salt Co. v. Guthrie*, 35 Ohio St. 672, *Craft v. McConoughy*, 79 Ill. 349, 22 Am. Rep. 171, and *Morris R. C. Co. v. Beasley C. Co.*, 68 Pa. St. 182, are to the same general effect.

In the case at bar the facts are, as we think, even stronger against the plaintiff than in *Arnott v. Pittston and Elmira Coal Company*, *supra*.

Here it entered into a contract with the object and view to suppress the supply and enhance the price of lumber in four counties of the state. The contract was void as being against public policy, and the defendants, as they had a right to do, repudiated the contract. Plaintiff, who has parted with nothing of value, now seeks to recover damages for non-delivery of lumber under this contract.

Plaintiff had an undoubted right to purchase any or all of the lumber it chose, and to sell at such prices and places as it saw fit, but when as a condition of purchase it bound its vendor not to sell to others under a penalty, it transcended a rule the adoption of which has been dictated by the experience and wisdom of ages as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade.

With the results naturally flowing from the laws of demand and supply, the courts have nothing to do, but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto.

2. It is claimed by appellant that the contract is divisible, and the first part can stand though the latter be illegal.

If the whole vice of the contract was embodied in the promise of the defendants not to sell lumber to other persons, the illegality would lie in the promise alone; and it might be contended with great force that this promise was divisible from

the agreement to sell. Under the findings of the court, however, the illegality inheres in the consideration.

The very essence and mainspring of the agreement—the illegal object—“was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured,” etc.

This being the inducement to the agreement, and the sole object in view, it cannot be separated and leave any subject-matter capable of enforcement, as was done in *Granger v. Original Empire Co.*, 59 Cal. 678; *Treadwell v. Davis*, 34 Id. 601; 94 Am. Dec. 770; and *Jackson v. Shawl*, 29 Cal. 267.

The case falls within the rule of *Valentine v. Stewart*, 15 Cal. 404; *Prost v. More*, 40 Id. 348; *More v. Bonnet*, 40 Id. 251; 6 Am. Rep. 621; *Forbes v. McDonald*, 54 Id. 98; *Arnott v. Pittston etc. Coal Co.*, *supra*.

The good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good, and therefore the subject of an action.

We fail to see any inconsistency between the eighteenth finding and the first or sixth. The first finding declares that plaintiff and defendants entered into the contract set out in the amended complaint. The sixth finding is to the effect that the contract has not been rescinded, abrogated, or modified. The eighteenth finding is as to the real object and purpose of the contract.

The judgment of the court below is affirmed.

CONTRACTS IN RESTRAINT OF TRADE: See note to *Hodge v. Sloan*, 1 Am. St. Rep. 822; note to *Chicago Gas Light Co. v. Gas Light Co.*, 2 Id. 135; note to *Berlin etc. v. Perry*, 5 Id. 240.

CONTRACTS — ILLEGAL. — ILLEGAL CONTRACTS ARE VOID, and courts will not lend aid to enforce them: *Tatum v. Kelley*, 25 Ark. 209; 94 Am. Dec. 714; *Lord v. Chadbourne*, 42 Me. 429; 64 Am. Dec. 290; *Alford v. Burke*, 21 Ga. 46; 68 Am. Dec. 449; *Buck v. Albee*, 26 Vt. 184; 62 Am. Dec. 564; *Schmidt v. Barker*, 17 La. Ann. 261; 87 Am. Dec. 527.

WHEATON v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

[76 CALIFORNIA, 415.]

INSURANCE. — EVIDENCE THAT THE AGENT OF THE INSURER IN WRITING OUT THE APPLICATION OMITTED ANSWERS made by the applicant, or wrote the answers substantially different from those actually given, is receivable on behalf of the assured, when he did not read the application as written out, nor have any knowledge of its falsity. The rule may be otherwise when the application contains a stipulation that the insurer shall not be bound by any knowledge or information given to his or its soliciting agents.

INSURANCE. — TO AVOID A POLICY FOR OVER-VALUATION, it must appear that such over-valuation was intentional, fraudulent, and not an honest expression of opinion. This rule prevails although the policy contains this stipulation and condition: "If any false representation is made by the assured of the condition, situation, or occupancy of the property, or any over-valuation, or any misrepresentation whatever, either in a written application or otherwise, this policy is void."

INSURANCE — WARRANTIES, WHAT ARE NOT. — Statements in an application, though declared to be warranties, will not be given effect as such if qualified by other stipulations which show that the parties did not so regard them.

INSURANCE — A REPRESENTATION IS CLEARLY DISTINGUISHABLE FROM A WARRANTY. — The former is a part of the proceedings which propose a contract, while the latter is a part of the completed contract. The falsity of the former may render the contract voidable for fraud; but a non-compliance with the latter is an express breach of the contract.

INSURANCE — WAIVER REQUIRED TO BE IN WRITING. — When a policy of insurance declares that there can be no waiver except in writing indorsed on the policy, the mode enters into and becomes a part of the power; the insured has full notice when he enters into the contract that a condition cannot be waived by an agent to whom the provision as to written indorsement relates, except in the manner in the contract provided.

INSURANCE — WAIVER, PROOFS OF LOSS. — Clause in a policy of insurance prohibiting any waiver unless indorsed on the policy refers only to those provisions of the policy which enter into and form part of the contract of insurance, and which may properly be designated as conditions; it has no reference to those stipulations which are to be performed after a loss has occurred, — such as giving notice and furnishing preliminary proofs.

ESTOPPEL — WAIVER — THERE CAN BE NO ESTOPPEL WHEN THE FACTS ARE UNKNOWN. — No one can be presumed to have waived that the existence of which he has not known.

INSURANCE — WAIVER OF RIGHT TO URGE OVER-VALUATION. — Instruction to jury, that if the agent of the insurer, after knowing that the property was over-valued in the application, requested the assured to make out preliminary proofs, and present vouchers in support of his claim, and thereby put him to trouble and expense, then the right to urge such over-valuation as a defense was waived, is erroneous in this, that it omits the element of intent in the over-valuation. Not until the insurer or its agents had notice of an intentional over-valuation was it

advised of any cause of resistance. Therefore, prior to such time, it could not be guilty of bad faith in advising the assured to proceed to comply with his policy by making proper proofs of loss.

INSURANCE—ESTOPPEL.—If no act has been done or left undone by the assured, in reliance on the action or non-action of the insurer, there can be no estoppel. An estoppel can never arise by implication alone, except by some conduct which induces action in reliance upon it to an extent which renders it a fraud to recede from what the party has been induced to expect.

EQUITABLE ESTOPPEL IS ONLY CALLED INTO EXISTENCE FOR THE PREVENTION OF WRONG and the redress of injury. There must be some element of wrong in the action of the party creating it. He must know, or have sufficient reason to believe, that another will place himself in a different position, or subject himself to additional injury in consequence of the action or representation.

INSURANCE.—ESTOPPEL AGAINST RESISTING AN ACTION TO RECOVER UNDER AN INSURANCE POLICY DOES NOT ARISE FROM A REQUEST TO MAKE PROOF OF LOSS, and to furnish vouchers. The action of the insured in making such proofs is referable to his contract, and the necessity of complying with it; and the request to him to make the preliminary proofs cannot be enlarged beyond its natural import, and converted into an engagement to waive any defenses to which the insurer is otherwise entitled.

ACTION on an insurance policy. The property for the loss of which the plaintiff sought to recover consisted of fixtures in a bath-house and saloon, insured for eleven hundred dollars, of the value of thirteen hundred dollars, and in the application declared to be of the value of eighteen hundred dollars. The evidence was conflicting as to whether the insured knew of the over-valuation or not. His testimony was to the effect that he did not read the application, and did not know of the valuations named therein. Verdict and judgment for the plaintiff.

T. C. Van Ness, for the appellant.

McAllister and Bergin, for the respondent.

McKINSTRY, J. In *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, the insured signed an application for a life policy, containing declarations as to his life and past and present health, warranting the truth of such declarations; the application contained the stipulation that inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and they acted only on the written statements and representations referred to, no statements or representations made, or information given to the persons soliciting or taking the application

for the policy, should be binding on the company, or in any manner affect its rights, unless they were reduced to writing and presented to the home office in the application. There it appeared the agent of the company asked questions of the applicant, and the latter made answers which, if correctly written down, "would probably have caused the company to decline the risk." The agent, without the knowledge of the applicant, wrote down false answers concealing the truth, which were signed by the applicant without reading, and by the agent transmitted to the company, and the company thereupon assumed the risk. It was said that it was the duty of the applicant to read the application before signing it, and as the application on its face showed that the power of the agent was limited, and as it was conditioned in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on the principal, the policy was void.

It seems to have been held that the insured must be presumed to have notice of the limitations upon the powers of the agent contained in the application which he would have received if he had read the application. The case is distinguished from *Insurance Co. v. Wilkinson*, 13 Wall. 222, and *Insurance Co. v. Mahone*, 21 Id. 152, the court saying: "In neither of these cases was there any limitation upon the power of the agent brought to the notice of the assured."

In the case at bar there was evidence that the plaintiff did not read the application prepared by the agent, and had no knowledge of the statement therein as to the values of the property insured. The application does not contain any express limitation upon or define expressly the authority of the agent.

The present case is within the principles laid down in *Insurance Co. v. Wilkinson*, 13 Wall. 222, and *Insurance Co. v. Mahone*, 21 Id. 152.

In *Insurance Co. v. Wilkinson*, *supra*, it was held that insurance companies who do business at a distance from their principal place of business are responsible for the acts of their agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge; hence when the agent undertakes to prepare the application for the insured, he will be regarded in doing so as the agent of the insurance company, and not of the insured. In *Insurance Co.*

v. *Mahone, supra*, a like ruling was made; and it was held that an answer to a question put to an applicant, as written down by the agent of the company when he takes the application, signed by the applicant, may be proved by the testimony of persons who were present not to have been the answer given by the applicant.

The law bearing upon the question is very clearly laid down by May in his work on insurance. "Insurers may and often do find themselves in such a position that they cannot avail themselves either of breach of warranty or of misrepresentation or concealment. And when in this position, they are said to be estopped from availing themselves, or to have waived the right to avail themselves, of such a defense. And the rule here is, with reference to the negotiations had at the time of taking out the policy, that when the application is reduced to writing by the insurer or his agent upon the oral statement of the applicant, whether the application is or is not made tantamount to a warranty, by being made part of the contract, the insurer being under a strong moral obligation to secure to the applicant the protection for which he pays, if a controversy arises upon the truthfulness of the application, and statements alleged by the insurer to be essential are omitted, and others falsely made, and he seeks to avoid the contract on that ground, parol evidence is admissible to show that at the time the negotiations were pending the facts alleged to have been omitted or falsely stated were in fact truly stated": May on Insurance, p. 605, sec. 497.

Of course it was for the jury who tried this cause to decide whether the plaintiff knew of the contents of the application before he signed it, or whether he gave a different valuation to that therein inserted, and had reason to believe that his statement as to value had been written down as he gave it.

In the answer as written down by the agent of defendant herein, the properties insured are stated to be severally worth nine hundred dollars, five hundred dollars, and four hundred dollars, — eighteen hundred dollars in the aggregate.

There was testimony that prior to the preparation of the written application the plaintiff stated to the agent of the defendant that the value of the whole property insured was about fifteen hundred dollars. The amount of insurance was eleven hundred dollars, — six hundred dollars, three hundred dollars, and two hundred dollars.

At the trial it was stipulated that the value of the insured

property at the time of the insurance, and also at the time of the fire, was the amount stated in the plaintiff's preliminary proof of loss,—\$1,302.18.

The policy contains the clause: "Special reference being made to assured's application and survey No. 261,707, which is his warranty, and a part hereof." It also contains the stipulation and condition: "If any false representation is made by the assured of the condition, situation, or occupancy of the property, or any over-valuation, or any misrepresentation whatever, either in a written application or otherwise, this policy shall become void."

In *Helbing v. Svea Ins. Co.*, 54 Cal. 156, 35 Am. Rep. 72, it was held that a provision in a policy of insurance that the application shall be considered a warranty, and if the property insured is over-valued in it the policy shall be void, applies only where the statements as to value are intentionally false; that the question of fraud is one of fact; that, although, where the discrepancy between the statement in the application and the actual value of the property is so great as to convey the conviction of fraud to the reasonable mind, the jury may and ought to find fraud, yet, where the discrepancy is very considerable, the jury may find the application not to have been fraudulent, even in the absence of explanatory evidence.

There have been decisions in other states to the contrary of the view of this court in *Helbing v. Svea Ins. Co.*, *supra*, the question being the construction of a condition that the policy shall be void in case of over-valuation. But, as said by Mr. Wood: "There can be no doubt that, in conformity with the ordinary rules of construction applied to insurance contracts, and the ordinary principles of justice and fair dealing upon which they are supposed to be predicated, a policy cannot be held to be void for breach of such a condition, unless the over-valuation is intentional and fraudulent, and not a fair expression of the honest judgment of the insurer, and the fact that the property has been considerably over-valued does not, of itself, establish such fraud on the part of the assured as avoids the policy, and the burden is on the insurer to establish both the over-valuation and the fraud": 1 Wood on Insurance, sec. 325; see cases *pro* and *con* cited in notes to the section. The estimate of value is an opinion. The answer to the question asked as to value is to be treated as if the question read: "What, in your honest judgment and opin-

ion, is the value of the property?" The same learned writer says: "A doctrine that held the insurer up to a strictly exact valuation would be extremely unjust, and would result in vitiating one half of the policies issued; for under the rule the difference of one cent is as disastrous as a difference of a large amount": *Id.*

Moreover, the language of the provision in the policy here sued on, that if any false representation is made by the assured, etc., the policy shall become void, when read as a whole, very clearly shows that a willful misrepresentation as to the value of the property, or one made with such gross and reckless carelessness as in law would be treated as willful, was in the contemplation of the parties. If so, the previous clause does not make the valuation a warranty. Even when the statements in the application are declared to be warranties, they will not be regarded as such if qualified by other stipulations, which afford a fair inference that the parties themselves did not so intend them. The provision that an intentional over-valuation of the property should avoid the policy was utterly unnecessary, and must be disregarded, if it was intended the applicant should warrant the exact correctness of his valuation: *May on Insurance*, sec. 161.

The case at bar does not, however, require a full consideration of the doctrines of warranty, as applied to insurance contracts, which, whatever their form, are treated as conditions precedent.

There was evidence that the eighteen-hundred-dollar valuation was no part of the contract between these parties. If it be said that the statement of plaintiff—"about fifteen hundred dollars"—was not true, that statement was no part of the contract, as merged in the writings,—therefore no warranty. A representation is clearly distinguishable from a warranty; the former being a part of the proceedings which propose a contract, and the latter a part of the contract when completed. A misrepresentation renders the contract void on the ground of fraud; a non-compliance with a warranty is an express breach of the contract: *Angell on Fire and Life Insurance*, 146, 147. A fraudulent misrepresentation will avoid the contract whether it is expressly so stipulated or not. Representations are *dehors* the contract. If the policy was issued to the plaintiff without any answer in the application to the inquiry as to value, there could be no breach of warranty

as to value: *Carson v. Jersey City Ins. Co.*, 49 N. J. L. 300; 39 Am. Rep. 584.

That an over-estimate of about two hundred dollars was not necessarily intentional or fraudulent is, as appears from what has been said, very clear.

The charge of the court to the effect that the over-valuation did not deprive the plaintiff of his right to recover unless it was intentionally or knowingly made, or the application was so negligently made as to induce an over-valuation, was, under the circumstances, not erroneous. The charge, in so far as it seems to make the plaintiff's right to recover depend upon affirmative fraudulent acts and conduct of the defendant's agent, which induced the plaintiff to sign the application, was at least as favorable to the defendant as it was entitled to ask.

The court below instructed the jury: "When there has been a breach by the insured of the warranty contained in an application for insurance, the insurance company may or may not take advantage of such breach, and claim a forfeiture; but it may also waive a forfeiture, and this it may do by any act on its part which, after its full knowledge of such forfeiture, subjects the insured party to trouble and expense as to his claim for insurance on said forfeited policy."

The sixth subdivision of the policy reads: "The use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein." And by the twelfth subdivision: "It is further understood and made part of this contract that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions, . . . nor, in case this policy shall become void by reason of a violation of any of the conditions thereof, has the agent power to revive the same," etc.

The witness Heacock testified that the plaintiff did, in fact, read the application and questions attached before signing them. If the jury believed such testimony, it was evidence tending to show that the plaintiff had knowledge of the answer valuing the insured property at eighteen hundred dollars; that he approved of the statement, and, by ratification, recognized Heacock as his agent in preparing the application. If he did, with knowledge of the contents of the application, sign it, he was bound by the statements contained in it. And

the difference of five hundred dollars was some evidence of an intentional over-valuation. Whether he did or did not know its contents was a question of fact for the jury. Upon the hypothesis that he did know, the charge last quoted was material, and may have controlled the action of the jury in finding their verdict. It becomes important, therefore, to inquire whether the charge correctly declares the law.

It is contended by respondent that the limitation of the agent's power contained in subdivisions of the policy 6 and 12, above quoted, do not apply to a waiver of forfeiture based on an over-valuation of the property insured. But if the statement that the property was worth eighteen hundred dollars was the statement of the plaintiff, its correctness as the fair judgment of plaintiff was a condition entering into and forming a part of the contract of insurance; and it is to such conditions—and not to mere omissions in the mode or manner provided for proving the loss after a fire—that a clause, “nothing less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall operate as a waiver of any printed or written condition or restriction therein,” refers: *Blake v. Exchange M. Ins. Co.*, 12 Gray, 265; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; 11 Am. Rep. 469; *McCormick v. Springfield Fire & M. Co.*, 66 Cal. 364.

It is said in Wood on Fire Insurance (sec. 325) that when the insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions of the contract, it is treated as having waived their performance, and the assured may recover without proving performance, “and that, too, even though the policy provides that none of its conditions shall be waived except by written agreement.”

But the cases referred to are those in which the agent, authorized to do so, has waived the condition. There is a class of cases in which it has been held that where the policy contains a provision that if the premium shall not be paid on a day certain, or shall not be paid when the policy is delivered, the policy shall be void, and that no agent is authorized to waive any condition without authority in writing; still, as the company may at any time authorize its agents to make agreements extending the time for payment of premiums, or waiving forfeiture for non-payment, it is not bound to act on the declaration in its policy that they have no such authority; that whether it has exercised its option to empower its agents

to give credit or extend time is provable by evidence, oral or written; and, as showing that the company has given its agent such power, evidence is admissible as to its practice in allowing him to extend the time: *Carson v. Insurance Co.*, *supra*; *Insurance Co. v. Norton*, 96 U. S. 243; *Phoenix Ins. Co. v. Doster*, 106 Id. 30. But where the policy contained the provision that no agent had power to waive any condition without authority from the secretary in writing, and the agent delivered a policy without payment of the premium, and there was no evidence, oral or written, that he had power to do so, and the premium was not paid, it was held the holder of the policy could not recover: *Pottsville Mutual Fire Ins. Co. v. Minnequa Springs Co.*, 100 Pa. St. 137. The class of cases referred to is very different from that in which the policy provides that there can be no waiver except in writing indorsed on the policy. In the last case, the mode enters into and is a part of the power; the insured has full notice when he enters into the contract that a condition cannot be waived by an agent to whom the provision as to written indorsement relates, except in the manner in the contract provided.

It is insisted by appellant that the instruction last quoted must have misled the jury. The statement on motion for new trial contains no specification of insufficiency of evidence to sustain a finding that a forfeiture was waived, — a finding which may have been included in the general verdict; and the defendant did not ask for an instruction indicating what facts should appear to make appropriate the instruction given. Under the circumstances, we think the order refusing a new trial should not be reversed, because of the possible ill effect of a charge abstractly correct. We say abstractly correct, for it cannot be doubted that an insurer may waive a condition orally, or by his acts or conduct.

It may be remarked that this court has not held (in a case in which the question was necessarily decided) that a provision in a policy that there shall be no waiver of a condition, except by writing indorsed on the policy, applies to a waiver by a "general agent" of a foreign corporation, — so named, and registered as such under the statute, — with presumed original powers co-extensive with those of his principal, where no restriction upon his powers is inserted in the policy: See *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315; 42 Am. Rep. 297.

In *McCormick v. Springfield Co.*, *supra*, it was held that the

facts were insufficient to prove a waiver or estoppel. If what is there said seems to imply that a general agent (restrictions upon whose general powers are not inserted in the policy or brought home to the insured) can never waive a forfeiture except by writing, etc., the statement is mere *dictum*. In *Glad-ding v. California Farmers' Mut. Fire Ins. Co.*, 66 Cal. 6, the scope or extent of the agent's authority did not appear. Nor do the exigencies of the present case demand a determination of the question suggested.

The court below charged the jury that the delay in the presentation by plaintiff to defendant of proofs of loss was waived, if certain acts of the general agent of the defendant were proved to their satisfaction. The clause in the policy as to no waiver except by indorsement refers to those provisions of the policy which enter into and form a part of the contract of insurance, and which are properly designated as conditions; it has no reference to those stipulations which are to be performed after a loss has occurred, — such as giving notice and furnishing preliminary proofs: *Franklin etc. Co. v. Chicago Ice Co.*, *supra*; *Blake v. Exchange Co.*, *supra*. There can be no doubt that the agent may waive a delay in presenting preliminary proofs. Whether in this case the agent did waive it was, however, a question of fact for the jury, and it is not a practice to be commended for a court to instruct the jury that they must infer a fact from other facts: Const., art. 6, sec. 19. Yet, as the jury would not have been justified in finding upon the facts recited that the delay was not waived, the instruction did not injure the defendant. It would appear that the facts stated in the instruction were not controverted.

The court below instructed the jury: "If Mr. Grant was at the time and after the fire in question the agent of the defendant, and as such had knowledge of the fire in question, and also of the valuation of eighteen hundred dollars of the insured property in question in plaintiff's application for insurance, and sent Mr. Sexton or Mr. Dimond to Santa Cruz to examine after the fire, as to the value of the insured property in question, and was informed by the report of said Sexton or Dimond that said insured property was over-valued in said application, and was of much less value than eighteen hundred dollars, and believed said report; and if Mr. Grant, after all this, requested the plaintiff to make out preliminary proofs, and present vouchers in support of his claim on the policy of insurance in question, and thereupon the plaintiff was put to

the trouble and expense of making preliminary proofs as to his said claim, by said action of Mr. Grant, — if you find such action established by the evidence, you will be authorized to find that the defendants waived any forfeiture resulting from any over-valuation of the insured property in plaintiff's application for said insurance."

It has been held that an adjustment of a claim by an insurer after a loss, and an agreement to pay a certain sum in liquidation, is a new contract, and that in an action on such new contract the insurer cannot, in the absence of fraud, set up a breach of warranty or condition of the policy, even if ignorant of the breach until after the agreement to pay: 2 Wood on Insurance, sec. 450. We understand this to mean fraud on the part of the insured which induces the insurer to enter into the settlement. But here there was no such adjustment or agreement, and the action is on the policy.

The waiver spoken of in the instruction is another term for estoppel. There can be no estoppel where the facts are not known, as no one can be presumed to have waived that the existence of which he has not known: *Finley v. Lycoming Mut. Ins. Co.*, 30 Pa. St. 311; 72 Am. Dec. 705; *Forbes v. Agawam Mut. Fire Ins. Co.*, 9 Cush. 470; *Allen v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366; *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279. And the facts proved must be such that an estoppel is clearly deducible from them. Estoppels are not favored: *Franklin v. Merida*, 35 Id. 558.

The representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. Certainty is essential to all estoppels: Bigelow on Estoppel, 559.

It is true, the jury were told that if the recited acts were proved, they were "authorized," not required, to find the estoppel. But, as we have seen, the difference between the statement of value in the application and the actual value, even if very great, is at most but evidence of an intentional over-valuation, and to constitute a breach of the condition, the over-valuation must be intentional. It would appear that a "considerable" over-valuation does not of itself establish fraud *prima facie*: Wood on Insurance, sec. 325. Even if it be conceded that had the jury inferred fraud from an over-valuation of five hundred dollars, the verdict would not have been set aside, it is certain that if they had found no fraud, notwithstanding an over-valuation of five hundred dollars

unexplained, we would not annul the verdict as being against the evidence. From the circumstances assumed in the instruction, the agent of the defendant was not bound to know as a fact that there had been a breach of the condition. He may have believed no fraud, although he accepted as true the statements contained in the reports of his subordinates; even if those reports aroused his suspicions, he may, as a prudent and reasonable man, have reserved the matter for further investigation. He was not estopped, as having knowledge of a fact, because another fact was brought to his attention which might have excited his suspicion, or even if the fact of which he had notice ought to have put him upon inquiry. The appropriate time for investigation as to breaches of warranty or falsity of representation is when application is made for payment of a claim, and presentation of the proofs: 2 Wood on Insurance, sec. 450. It would be unjust to the agent of defendant to assume that he anticipated the possible result of such investigation, and determined there had been an intentional over-valuation prior to the investigation. And it would place an insurer in the power of a fraudulent applicant if, having some reason to suspect a fraudulent representation, although not in possession of evidence on which he could prudently rely to prove it, he should be held to be estopped from establishing the fact that the representation was intentionally false, because he had received or asked for proofs of the loss. Even if the jury would have been authorized to infer that the agent knew of the intent to over-value, if he knew of the over-valuation, they were not so instructed. They were told they might find an estoppel from the agent's knowledge of an over-valuation, and his request for preliminary proofs; and must have understood that they could find the estoppel by direct inference from his knowledge of the over-valuation, whether he had or had not knowledge that it was intentional. This they were not authorized to do. The question is not whether there was any evidence tending to prove knowledge by the agent of a fraudulent over-valuation, but whether the jury could properly be instructed that they could directly infer, from a fact which tended to prove another fact, that which they were authorized to infer only from the fact which the probative fact tended to prove. As an intentional over-valuation would alone avoid the policy, it would seem clear that knowledge by the defendant of such intentional over-valuation was one of the facts necessary to be proved to make out an

estoppel. If so, the jury were not authorized to find estoppel upon mere knowledge of the over-valuation and request by defendant for the production of proofs of loss.

In cases like the present, it must appear that the insured was misled to his prejudice; and where no act has been done, or left undone by the insured, in reliance on the act or non-action of the insurer, there can be no estoppel: May on Insurance, sec. 507; *McCormick v. Springfield Co.*, *supra*. The acts or declarations must have influenced the conduct of the other party to his injury: *Boggs v. Merced Company*, *supra*. An estoppel can never arise by implication alone, except by some conduct which induces action in reliance upon it to an extent which renders it fraud to recede from what the party has been induced to expect: *Security Ins. Co. v. Fay*, 22 Mich. 467; 7 Am. Rep. 670. An equitable estoppel is only called into existence for the prevention of wrong and redress of injury. There must be some element of wrong in the action of the party creating it. He must know, or have sufficient reason to believe, that another party will place himself in a different position, or subject himself to additional injury in consequence of the action or representation.

The jury were not authorized to find that the plaintiff was "put to the trouble and expense of making preliminary proofs as to his claim," by the agent's request that he make such proofs. The plaintiff could not have been induced to go to such trouble and expense by the mere waiver of time within which the proofs were to be made, or of the stipulated mode of making them. It was equally his duty to make them whether the time and mode were waived or not. His action is to be referred to the contract; his motive to the necessity of making the proofs as a preliminary to securing the insurance. After he was requested to make the proofs he had agreed to make, he made them, but the statement that he was induced to make them by the request is only a *post hoc ergo propter hoc*. The waiver was for his benefit, and simply left him with a right to make proofs after the time or in a different manner from that prescribed. Such must have been understood by both parties to be the purpose of the waiver as to the production of the preliminary proofs, or the request for them.

Nor were the jury authorized to find that the plaintiff would have abandoned all claim against the defendant had he been informed that the latter would resist the claim in reliance upon a breach of the condition as to over-valuation. Whether

the defendant waived any forfeiture by reason of a breach of that condition or not, it was the duty of the plaintiff to make proof of his loss, and no greater effect should be referred to a request for such proof than such as would naturally, or in the usual course of things, be caused by it. His request cannot be enlarged beyond its natural import and meaning,—a waiver of plaintiff's previous failure to produce, or irregularity in producing, the preliminary proofs. The plaintiff's "trouble and expense" in preparing such proofs could not operate to estop the defendant from asserting a right which had no direct relation to or connection with their production.

Were the jury authorized to find, upon the facts recited in the instruction, that it was a fraud on the part of the defendant to insist upon a breach of the condition with respect to an intentional over-valuation? There can be but one answer to the question. The facts recited could not establish an estoppel, such as the jury were instructed could arise from them.

Judgment and order reversed, and cause remanded for a new trial.

INSURANCE — APPLICATIONS MADE OUT BY AGENTS — WAIVERS BY AGENTS, ETC. — At least three of the points discussed in the foregoing opinion so frequently recur in insurance litigation, and seem so difficult to set at rest by repeated though somewhat inharmonious adjudications, that we feel justified in calling attention to the more recent decisions with regard thereto.

The first question, and one of paramount import to the insured, respects the consequence of a mistaken or designing agent of the insurer inserting in the application for the insurance statements or answers which he knows to be false, where the assured is innocent of all complicity in the agent's fraud or mistake. Until a comparatively recent period the courts were nearly unanimous in regarding the knowledge of the agent as that of the insurer; and in resisting alike the attempts of the latter to make him the agent of the assured, or to repudiate, avoid, or impair the contract of insurance by showing that the statements written by him in the application, though known by him to be false and not to have been made by the assured, were received and acted upon by the insurer as true, and that their falsity constituted such a breach of the conditions of the insurance as precluded any recovery thereon.

Under the decision in *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, it is at least possible for life insurance companies to escape liability when applications are falsely made out by their agents. This was the course adopted in that case. The insurer prepared a statement to accompany applications. This statement (which we assume to have been a printed blank) warranted that the statements in the application were true, and agreed that they should be the basis of any contract between the applicant and the insurer; and that if any of them were untrue, the policy which might be issued thereon should be void; and further agreed that, inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and as they acted only on the written statements and representa-

tions referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy should be binding on the company or in any manner affect its rights, unless they were reduced to writing and presented at the home office in the application. The statements and representations with this declaration, accompanying the application and forming a part of it, were forwarded to the home office in New York. The policy was thereupon issued, and sent to its agent at St. Louis for delivery to the assured. It recited that it was issued in consideration and upon the faith of the statements and representations contained in his application, all of which had been warranted by him to be true, and also in consideration of the cash payment and annual premiums to be paid. It stipulated for the payment of the amount of the insurance within sixty days after due notice and satisfactory proof of his death, subject to the conditions specified therein. To the policy was annexed a copy of the application, and upon it was indorsed the following notice in red type, and conspicuously printed: "For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, an abstract of the application upon which this policy is based may be found in the third page within. If corrections are desired, when satisfactory to the company, a certificate to that effect will be issued over the signature of the president and actuary."

About three years after the policy was issued the assured died. Proofs of his death were made, and in due time his executor commenced an action to recover upon the policy. To this action the defendant answered that it was stated in the application that the assured never had had any disease of the kidneys or any serious disease, when the fact was that he had been afflicted with such disease before his application was made, and had been under medical treatment therefor. To this the plaintiff replied that the assured was personally known to two agents of the insurer residing in St. Louis, who well knew his physical condition, and were told by the assured that he did not believe himself insurable. They assured him he was insurable, and they read certain questions from a printed blank, which they said he should answer as a matter of form, and they pretended to write down his answers. He told them he had had a disease of the kidneys, as they well knew, and had been treated for diabetes, and referred them to the doctor who had treated him for further information. After the assured had answered the questions they told him to sign another paper which they had, for the purpose, as they said, of identifying him as the person for whose benefit the policy was to be issued. He signed this paper as well as the application; but did not read either paper, and had no reason to believe that his answers had been taken down falsely. He did not read the policy when it was received by him, nor the copy of the application attached to it. The agent who delivered the policy told the assured that it was all right; that he was insured, and need give no further attention to the matter.

The court was nevertheless of the opinion that no recovery could be had, other than that of the premiums actually paid on the policy, and said: "It is conceded that the statements and representations contained in the answers as written of the assured to the questions propounded to him in his application respecting his past and present health were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them, that if they were false in any respect the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he

never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that such proof being made, the plaintiff is not estopped from recovering. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such a cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitations upon the powers of the agent, is for the amount of the premiums paid. But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed. . . . There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an

approval of the application and of its statements. The consequences of that approval cannot, after his death, be avoided."

That portion of the argument of the court which proceeds upon the assumption that as the insurer had no knowledge of the real answers or representations made by the assured, and had every reason to believe that it was contracting upon representations substantially different, the assured had no right to treat the contract as based on the unknown rather than on the known representations, at first seems entitled to very great force; but further consideration produces the conviction that, in contemplation of the law, the assumed facts do not and cannot exist. As a matter of fact, a principal may be ignorant of every act done, every representation made, and every fact known by his agent. But the law does not tolerate such ignorance, or at least, does not permit the principal to interpose it to screen him from liability. What his agent said, did, and learned while engaged in the transaction of his business, he, the principal, must be regarded as saying, doing, and learning; and it would be a very unsound public policy which would permit a principal, in his delegation of authority to his agent, to stipulate against the usual consequences of agency, and particularly against the application to the agency in question of the well-known rule of law, that knowledge acquired by the agent while engaged in the discharge of a duty which the principal has confided to him must also be imputed to the principal. If an insurance corporation may stipulate that it shall be regarded as ignorant of every fact learned by its agent, but not communicated to it, so may any other principal; and if immunity may be secured from the operation of this principle of the law of agency, it may, in the same mode, and with equal propriety, be secured against all other portions of the law of agency from which, in the contemplation of the principal, it may be profitable to be freed.

Where an agent of an insurance corporation is authorized to solicit insurance, and is furnished with blank applications which he, to the knowledge of his principal, fills out and forwards to the home office for the purpose of obtaining insurance, and thereby earning his commission, he is the agent of the insurer, and not of the assured, and information given to and knowledge gained by him while soliciting the risk or filling out the application must be imputed to the insurer, and the policy of insurance subsequently issued must be enforced as fully as if the facts disclosed to the agent had in fact been disclosed to the principal. While, as a general rule, a party to a contract or representation will not be permitted to urge that he did not read it before he affixed his signature thereto, and that he was ignorant of its contents, and supposed them to conform to what he had agreed with or represented to the adverse party or his agent, the application of this rule has been almost uniformly denied when sought to be applied to the business of insurance as it is conducted in the United States: *Miller v. Phoenix Ins. Co.*, 107 N. Y. 296; *Bennett v. Agricultural Ins. Co.*, 106 Id. 243; *McGurk v. Met. Ins. Co.*, 18 Ins. Law J. 103; *Wilson v. Minnesota Ins. Ass'n*, 36 Minn. 112; 1 Am. St. Rep. 659; *McArthur v. Home Life Ins. Co.*, 73 Iowa, 336; 5 Am. St. Rep. 684; 17 Ins. Law J. 129; *Menk v. Home Mut. Ins. Co.*, 76 Cal. 50; *ante*, p. 158; 17 Ins. Law J. 771; *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 557; *Beal v. Park*, 16 Wis. 241, and cases cited in note thereto, 82 Am. Dec. 722; *Germania F. Ins. Co. v. Hick*, 125 Ill. 361; 17 Ins. Law J. 774; 8 Am. St. Rep. 384; *Reiner v. Dwelling House Ins. Co.*, Sup. Ct. Wis., April, 1889; *Barnes v. Hekla Ins. Co.*, 75 Iowa, 11; *post*, p. 450. Hence, where the agent taking the application receives true answers and writes out false ones, the policy will be regarded as based on the answers which he gave rather

than on those which he fraudulently inserted; and the assured will be estopped from urging the falseness of the answers as written by the agent, though the application or policy asserts that the applicant warrants the truth of the answers: *Kenyon v. Knights Templar*, 49 Hun, 278; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492; *Western Assurance Co. v. Rector*, 85 Ky. 294; *Kansas P. U. v. Gardner*, Sup. Ct. Kansas, April, 1889; *National M. F. Ins. Co. v. Barnes*, Sup. Ct. Kansas, March, 1889; *Deitz v. Providence M. Ins. Co.*, 18 Ins. Law J. 283 (W. Va.); *Brown v. Met. Ins. Co.*, 65 Mich. 306; 8 Am. St. Rep. 894; *Timmink v. Met. L. Ins. Co.* (Mich. 1888); *Williamson v. N. O. Ins. Ass'n*, 84 Ala. 106; *Richards v. Wash. F. & M. Ins. Co.*, 60 Mich. 420; *Sittz v. Hawkeye Ins. Co.*, 71 Iowa, 710; 16 Ins. Law J. 106; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600; *Mutual Ben. Ass'n v. Daviess*, 18 Ins. Law J. 269 (Ky., Nov. 1888).

The statutes of Iowa require a true copy of the application to be indorsed on the policy issued thereon, but declare that a non-compliance with this requirement shall not annul the policy. In a case wherein it appeared that an application had been made out by the agent of the insurer, a copy of which was attached to the policy, it was insisted that it was the duty of the assured to read the copy so attached, and to notify the insurer if he found any of the statements therein to be incorrect; "and as he failed to notify the company of such falsity, that he is now estopped from relying on the fact that he signed the application in blank, and had no knowledge of the representations therein made." But the court held otherwise, saying that the assured "was not required, nor had he any occasion, to examine the copy of the application indorsed on the policy": *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 696.

In the case of *Baker v. Ohio Farmers' Ins. Co.*, 17 Ins. Law J. 668 (Mich., May, 1888), the application for the insurance was made orally. The language of the policy was similar to that considered in the case reported in 117 U. S. The agent to whom the application was made, without the knowledge of the assured, wrote out and signed a written application, the statements in which proved to be false, and to be different from the oral statements made by the assured. On behalf of the insurer it was urged, for the purpose of avoiding payment under the policy, that the reference in the policy to an application by number was sufficient to warn the assured that some one had presented a written application on his behalf, and to impose on him the duty of ascertaining whether its representations were true. In this view the court did not concur. It regarded the act of the insurer in receiving an application, every written word of which, including the signature, was in the handwriting of its agent, as estopping it from relying on the conditions in the policy, which were manifestly aimed at false applications made by the assured.

The various state courts before which *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, has been cited as an authority have, so far as we can ascertain, been able to distinguish the cases before them from it, and to avoid either adopting or rejecting its doctrines. They seem at variance with the spirit of all the other decisions which we have cited, though in harmony with *Chase v. Hamilton Ins. Co.*, 20 N. Y. 55; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; and *Ryan v. World M. L. I. Co.*, 41 Conn. 168; *Alexander v. G. F. I. Co.*, 66 N. Y. 464; 23 Am. Rep. 76; *Rohrbach v. G. F. I. Co.*, 62 N. Y. 47. These cases all proceed upon the ground that the assured cannot escape the duty of reading the application, which must be the basis upon which his insurance will rest, and without which the officers of the insurer

can have no just appreciation of the risk. The ground thus taken, though defensible when viewed in connection with ordinary contracts and writings, is more questionable when used to support the claim that the assured rather than the insurer shall suffer from the fraud of the latter's agents. It is notorious that contracts of insurance are, on the part of the assured, entered into without the advice of counsel, and chiefly in reliance upon the representations of the soliciting agents of the insurer. Such agent is justly looked upon as the accredited agent of the company, in whom it has confidence, and holds out as worthy of the confidence of its patrons. Furthermore, the assumption is perfectly natural that he knows precisely what information his principal desires, and in what language it may be best expressed. And human nature must be far different from what it now is before the average applicant for insurance can be taught that he must be deaf to the representations of the agent while he sharpens his comprehension and applies it to the careful scrutiny of the insurance stationery, which, even without the suggestion of the wily agent, it is impossible for him to regard as other than a mere "matter of form."

Concerning provisions in insurance policies by which the power of agents to vary the contract or to waive forfeitures or conditions, except by some writing indorsed on the policy, is sought to be withheld, the authorities are still irreconcilable. The only question upon which there is any approach to harmony is that these provisions are inapplicable to proceedings which take place after a loss has occurred; and do not inhibit oral waivers of the requirements of the policy in respect to giving notice and making proofs of loss, and the like: *Travelers' Ins. Co. v. Harvey*, 82 Va. 949; *New Orleans Ins. Ass'n v. Matthews*, 65 Miss. 301; 17 Ins. Law J. 709; *Indiana Ins. Co. v. Capehart*, 109 Ind. 270; *contra*, *Walsh v. Hartford F. I. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144.

If the breach of condition occurred before the policy issued, and was known to the agent of the insurer when he received the premium, the policy will generally be deemed valid and enforceable, although it declares that it shall be void on account of such breach, unless the consent of the insurer is indorsed thereon. In such a case, as the breach of condition is pre-existing, and is known to the agent receiving the premium, if the company is not estopped from urging it as a defense, then it is permitted to receive a premium for a policy which never had any validity. This would operate as fraud upon the assured, and even in those states whose courts are inclined to give effect to stipulations requiring waivers to be made in writing, the fraud will not be permitted to bear fruit; and the condition will be regarded as irrevocably waived: *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Whited v. Germania F. I. Co.*, 76 N. Y. 415; 32 Am. Rep. 330; *Kruger v. F. & M. Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42; *Germania F. I. Co. v. Hick*, 125 Ill. 361; 8 Am. St. Rep. 384; *American Cent. I. Co. v. McCrea*, 8 Lea, 513; 41 Am. Rep. 647; *Van Schaich v. Niagara F. I. Co.*, 68 N. Y. 436; *Woodruff v. Imperial F. I. Co.*, 83 Id. 133; *Menk v. Home Ins. Co.*, *ante*, p. 158.

Stipulations requiring any waiver of a forfeiture or breach of condition to be expressed in writing, either by indorsement on the policy or otherwise, are sometimes regarded as securities against the uncertainties of parol evidence, and as such enforced to the extent of protecting the insured against the act of any of its agents, unless evidenced in the mode prescribed: *Smith v. Niagara Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144; *Putnam Tool Co. v. Fitchburg M. F. I. Co.*, 145 Mass. 265; *Kyte v. Commercial Ins. Co.*, 144 Id. 43; 16 Ins. Law J. 330.

An insurance corporation is but an artificial person, and as such is, or at least should be, subject to the rules of law applicable to natural persons conducting a like business. If a natural person should make a rule for his own government that he would never thereafter be bound by any act of which there was not written evidence, or that no acts of any of his agents should impose any obligation upon him unless reported to him in writing, it is manifest that the person who made the rule could unmake it, either by formulating another rule for his own government, or by a course of dealing which either indicated that he had abandoned his first rule, or could not, without being guilty of a breach of good faith, longer insist on its application. When an artificial person has made a like rule, there can be no question that it may also unmake it. The real difficulty is in determining whether it has done so. Whether in adopting and promulgating the rule, or in afterwards disregarding or annulling it, it must act by agents, for, being an artificial body, it cannot act otherwise. Nor can it deprive itself of the power to act by its agents in any lawful mode. If it declares that none of its agents shall act except in writing, the declaration is an unlawful restriction of its powers, and may be disregarded: *Lamberton v. Commercial F. I. Co.*, 18 Ins. Law J. 473 (Minn., Aug. 1888). It may, however, restrict the authority of its agents to a certain extent, not inconsistent with the continuance of its power to act for itself in any lawful manner. And though the agent be commonly known and styled a "general agent," his power to make an oral waiver may be denied, especially if the policy designates some other officer by whom the waiver may be made: *Marvin v. U. L. Ins. Co.*, 85 N. Y. 278.

Upon principle, we think it must be conceded that an artificial as well as a natural person stipulating that it shall not be bound except 'y a writing, may waive this stipulation without a writing, and that such waiver may be either express or implied: *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; *Lamberton v. Commercial F. I. Co.*, *supra*; *Morrison v. Insurance Co. of North America*, 69 Tex. 353; 5 Am. St. Rep. 63; *American Cent. I. Co. v. McCrea*, *supra*. But such a stipulation imparts notice to the person in whose policy or other contract it is inserted that the insurer has adopted the policy of not binding itself as to the matters referred to in the stipulation otherwise than by waiver in writing. He who seeks to avail himself of a change in this rule or policy must show that the change was made by competent authority; and competent authority must be some one either vested with power to annul or suspend the rule, — some representative of the company, whose relations to it are, at least apparently, such as to entitle him to control its policy; one whose official *status* is such that his act may justly be regarded as the act of his principal. Whether an agent occupies this *status* or not is, in many cases, a question of fact, to be determined from all the circumstances of the case, and from the general course of business as it was known by the company to have been conducted. A mere local agent rarely, if ever, occupies such a *status*: *Cleaver v. Traders' Ins. Co.*, 18 Ins. L. J. 36; 65 Mich. 527; 8 Am. St. Rep. 908; *Bowlin v. Helka Ins. Co.*, 36 Minn. 433; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Hankins v. Rockford*, 70 Wis. 1. But where the agent making the oral waiver is a general agent, and the power to make such waiver is not conferred on some other officer to his exclusion, or where the waiver, though made by a local and unauthorized agent, is reported to the company and ratified by it, though not in writing, or where the cause of forfeiture is reported or otherwise made known to the company, and it apparently acquiesces therein, and continues silent when its silence fosters the delusion that the insurance remains in force, and occasions the assured to remain

without the protection which he might find in other insurance, — then the stipulation against an oral waiver will itself be treated as waived: *Dial v. Valley Ins. Co.*, Sup. Ct. S. C.; *King v. Council Bluffs Ins. Co.*, 72 Iowa, 310; *Imperial F. I. Co. v. Dunham*, 117 Pa. St. 460; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; *Morrison v. Insurance Co. of North America*, 69 Tex. 353; *Lamberton v. Commercial F. I. Co.*, 18 Ins. Law J. 473; *Insurance Co. v. Wolf*, 95 U. S. 331.

WAIVER OF FORFEITURE BY REQUIRING FURTHER PROOFS OF LOSS. — There is, as it seems to us, in the principal case a sort of coquetting with some of the questions there involved, which leaves us in doubt respecting the real opinion of the court towards them. We know the result of the case; but confess our inability to determine to our satisfaction whether the principles applied were regarded as generally applicable, or merely as being appropriate to the special circumstances of the case. Thus, the court undoubtedly regarded the insurance company as not estopped from contesting the plaintiff's right to recover, by the fact that it requested him to furnish preliminary proofs of loss after it had notice of the breach of condition for which it was entitled to claim that its policy had become inoperative; and the court indulges some general reflections regarding the law of estoppel, from which the inference may fairly be drawn that the procuring or permitting the assured to make or perfect his proofs of loss, and his taking the trouble and incurring the expense incident to making such proofs, will rarely or never estop an insurer from relying on any defense he may have, arising from a known breach of the conditions of his policy. This inference, while thus inferable, is not asserted in direct terms. Hence it may be that the court only intended to declare that the circumstances of the principal case did not call for the application of the law of estoppel, rather than to deny that an estoppel might not arise from encouraging or requiring the assured to make out or perfect his proofs of loss after the insurer had notice of a breach of condition, which, if urged by it, would relieve it from the payment of loss.

In the case of *Marthinson v. North British & Mer. Ins. Co.*, 64 Mich. 372, it appeared that the assured made proofs of loss, which were submitted to the local agents, and then forwarded to the office of the insurance company. About a month after receiving these proofs, the insurer, by its superintendent, addressed a letter to the assured, pointing out certain defects in the proofs, making no references to any supposed breach of condition, but containing the following clause: "You will further take notice that in returning said papers, and making objections thereto, and in all other matters herein, this company waives none of its rights and defenses under said policy, but expressly reserves each and every one thereof unto itself." New proofs were thereupon made out and sent to the superintendent. He also objected to these, specifying his objections, and making, as before, a general reservation of the company's rights. After receiving the letter containing these objections, the assured further perfected his proofs, in conformity to the suggestions made by the superintendent. These last proofs were also objected to, and the same general reservation of rights made, without any reference to any particular supposed breach. When an action was finally brought against the company, it, among other defenses, urged that a forfeiture had occurred before the loss. Upon this branch of the case, the court said: "By the course of proceeding in reference to the reception and making of the proofs of loss by the defendant company, it must be considered as having waived all defenses based upon breaches of warranty or for-

feiture under the insurance contract. When the adjusting agents of the company were at Cadillac, on the 21st of August, 1884, by their examination of Barrington and Hiatt, they were put in possession of evidence, by the way of admissions of third parties under oath, which gave them the opportunity then of making the defense sought to be established upon the trial. They had only to say to the assured: 'By your own admissions, your policy is forfeited, and we refuse, therefore, to pay your loss.' On the contrary, they saw fit to remain silent, and, without notice of these different items of defense, put the assured to the inconvenience, trouble, and expense of perfecting their proofs of loss, and, in the very last letter, content themselves with objecting to such proofs. With a knowledge of all the acts creating the forfeiture claimed upon the trial, the defendant company put the assured to expense in perfecting proofs of loss, which, under the present claim of defendant, was wholly unnecessary, as the proofs, however perfect, were valueless, if the defense of forfeiture was a good one. By this action, the defendant company must be held to have waived such defenses: *Carpenter v. Continental Ins. Co.*, 61 Mich. 635; *German Fire Ins. Co. v. Grunert*, 112 Ill. 69, 78; *Titus v. Glen's Falls Ins. Co.*, 81 N. Y. 419; *Gans v. St. Paul etc. Ins. Co.*, 43 Wis. 109; 28 Am. Rep. 535. This question of waiver was submitted to the jury, but we regard it as a question of law, as the facts of the action of the company and the assured are undisputed, and mostly furnished by written evidence. The jury ought to have been instructed that the defendant had waived all defense based upon warranties or forfeitures. It is argued by defendant's counsel that the defendant saved its rights, and waived none of its defenses under the application or policy, by reason of the last clause of Cornell's first letter, to wit: 'You will further take notice that in returning said papers, and making the objections thereto, and in all other matters herein, this company waives none of its rights and defenses under their said policy, but expressly reserves each and every one thereof unto itself'; which clause, in substance, was repeated in the other letters. We do not think this general reference to other possible defenses was sufficient. It devolved upon the defendant to specifically state its defenses, or some of them, if it had any other than those going to the defects in the proofs of loss. If the company had frankly stated that it refused to pay the alleged loss because of the breaches of warranty and forfeiture by the conditions of the policy, the knowledge of which it then possessed, the assured would have, in all probability, gone no further into cost and trouble to perfect such proofs of loss, as its refusal to pay on other grounds would have rendered it unnecessary. This loose and general reservation of its rights cannot be considered as an adequate notice of the defenses insisted upon at the trial, and it must be held that such defenses were waived by its conduct: *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423."

The decisions elsewhere are in harmony with that of the supreme court of Michigan on this point. If the insurer has notice of a forfeiture, the effect of which is to relieve him from liability for a loss which has occurred, and intends to rely upon such forfeiture, it is his duty to not encourage a delusive hope on the part of the assured that payment will be made on making due proofs of loss, or complying with some other condition suggested by the insurer. He should promptly say to the assured, Our contract of insurance had ceased to exist before you suffered any loss, and it is idle for you to proceed upon any other assumption. If, on the other hand, the insurer occasions or encourages the assured to incur the expense and trouble of

making proper proofs of loss, he will, notwithstanding what is said in the principal case, generally be held to be estopped from afterwards proving a known pre-existing cause of forfeiture: *Niagara Fire Ins. Co. v. Miller*, 120 Pa. St. 504; 18 *Ins. Law J.* 359; *Carpenter v. Continental Ins. Co.*, 61 Mich. 635; *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 71 Wis. 454; 5 *Am. St. Rep.* 233.

[IN BANK.]

PEOPLE v. HANSELMAN.

[76 CALIFORNIA, 460.]

CRIMINAL LAW. — INDICTMENT FOR LARCENY MUST AVER THAT THE PROPERTY STOLEN BELONGED TO SOME PERSON other than the defendant.

CRIMINAL LAW. — CONSENT TO COMMISSION OF CRIME, which will relieve the act of its criminal character, is something different from mere passive submission without any previous understanding or preconcert with the criminal. Therefore, if a constable, for the purpose of detecting thieves, disguises himself, feigns drunkenness, and lies down in an alley in apparent stupor, where a thief finds him and takes money from his pocket, he being conscious of the act, and remaining passive in order that he might afterwards arrest and convict the thief, the act of the latter is larceny.

PROSECUTION and conviction for larceny.

Shaw and Damron, for the appellant.

George A. Johnson, attorney-general, for the respondent.

McFARLAND, J. The defendant, who is appellant here, was convicted of the crime of grand larceny, averred to have been committed by taking three dollars from the person of F. O. Slanker.

The motion in arrest of judgment should have been granted. There is no pretense of an averment in the information that the thing alleged to have been taken was the property of any person other than the appellant. The attorney-general admits this omission to be a fatal defect, "unless the code had changed the rule." But the code does not make any change which would justify a pleader in omitting from an indictment any essential element of the crime sought to be charged. And under all definitions of larceny found in the books, the ownership of the property averred to have been stolen in some other person than the one charged with stealing it is an essential element of the crime. The code of this state provides that it must be the property "of another." And all the authorities are concurrent to the point that this essential part of the crime

must be stated in the indictment: 2 Archbold's Criminal Law, 357 et seq.; 2 Russell on Crimes, 107. To disregard this firmly fixed and universal rule, in order to condone the faultiness of the information in this case, would be to commit an act of judicial usurpation. The case of *People v. Hicks*, 66 Cal. 103, cited for respondents, is against them. In that case the court held that there was a sufficient averment that the property stolen belonged to the prosecuting witness; and the opinion went upon the theory that such an averment was necessary. For this reason, therefore, the judgment must be reversed.

But as the case may possibly be tried again under another information or indictment, it is proper to notice the second point made by appellant. The appellant claimed that he was not present at the time of the alleged commission of the larceny, and introduced some evidence tending to prove an *alibi*. The jury, however, had a right to believe the testimony of the prosecuting witness, Slanker. But the appellant contends that Slanker's testimony, taken as true, does not make out a case of larceny, because it shows that the money was taken with his (Slanker's) consent. The statement of Slanker was substantially this: He was a constable in the town of Pomona, and some crimes having been committed in the town, he, for the purpose of detecting the thieves, on the night of the alleged larceny, disguised himself and feigned drunkenness. After staggering about the streets a while, he lay down in an alley and pretended to be in a drunken stupor. Shortly afterward, the appellant and another person came to him and took from his person three dollars, which he had put in the pocket of his overalls. He was perfectly conscious at the time and made no resistance, and intended that any thief who tried it should be allowed to take the three dollars in order that a case of larceny might be made out against him. He had no previous suspicion, however, of the appellant, and was surprised at his participation in the act. And under these circumstances counsel for appellant contends that the thing done was not larceny, because the money was not taken against the consent of the prosecuting witness.

It is no doubt true, as a general proposition, that larceny is not committed when the property is taken with the consent of its owner; but it is difficult in some instances to determine whether certain acts constitute, in law, such "consent." And, under the authorities, we do not think that there is such con-

sent where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that the owner wishes them taken, and no mutual understanding between the two, and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner. And some of the circumstances were present in all the cases cited by counsel for appellant.

In the case of *Rex v. McDaniel*, Fost. 121, which was a case of robbery, Salmon, the person alleged to have been robbed, entered into a conspiracy with one Blee, by which Salmon was to be robbed by Blee and certain other persons whom Blee was to entice into the scheme; and the court held that the acts done in carrying out the conspiracy, which looked like robbery, were not robbery at all, because Salmon was an active participant in and had planned the whole affair. And Justice Foster, delivering the opinion of the court, in noticing the case of one Norden, makes a distinction between that case and the McDaniel case, which may well be applied to the case at bar. He says: "I come now to the case which I promised at the beginning to consider and distinguish from the present case. One Norden, having been informed that one of the early stage-coaches had been frequently robbed by a single highwayman, resolved to use his endeavors to apprehend the robber. For this purpose he put a little money and a pistol into his pocket and attended the coach in a post-chaise, till the highwayman came up to the company in the coach and to him, and presenting a weapon, demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise with his pistol in his hand, and with the assistance of some others took the highwayman. The robber was indicted about a year ago in this court for a robbery on Norden, and convicted. And very properly, in my opinion, was he convicted. But that case differed widely from the present. In that case Norden set out with a laudable intention to use his endeavors for apprehending the highwayman, in case he should that morning come to rob the coach, which at that time was totally uncertain; and it was equally uncertain whether he would come alone or not. In the case now under consideration there was a most detestable conspiracy between Salmon and the rest of the prisoners that his property should be taken from him under the pretense and show of

a robbery, and time, place, and every other circumstance were known to Salmon beforehand, and agreed to by him."

In *United States v. Whittier*, 5 Dill. 35, cited by appellant, the defendant was tempted to send obscene matter through the mails by a decoy letter sent to him for the express purpose of inducing him to commit the offense.

In *Dodge v. Brittain*, Meigs, 84, the court merely holds that there would have been no larceny "if the master had directed the servant to deliver the property to the thief instead of directing him to furnish facilities for his arriving at the place where it was kept." This case, indeed, is most strongly against the contention of appellant.

Bishop, under the head of Plans to Entrap, sums up the authorities on the subject as follows: "If a man suspects that an offense is to be committed, and, instead of taking precautions against it, sets a watch and detects and arrests the offenders, he does not thereby consent to their conduct, or furnish them any excuse. And in general terms, exposing property or neglecting to watch it, under expectation that a thief will take it, or furnishing any other facilities or temptations to such or any other wrong-doer, is not a consent in law": 1 Bishop on Criminal Law, 262.

From the authorities and upon principle, we are of opinion that the conduct of the witness Slanker, as detailed by him in his testimony, did not amount to consent in law, and affords no reason why the act of appellant in taking the money (if he did take it in the manner as sworn to by Slanker) was not larceny. If there had been preconcert of action between Slanker and appellant, a different question would have been presented.

We think that the instructions of the court were, upon the whole, correct; but the record does not show any exceptions taken to them. At all events, if there shall be another trial, the court can readily make its instructions comply with this opinion.

Judgment and order appealed from reversed, and cause remanded.

LARCENY — WHAT CONSTITUTES. — Taking away without consent of the owner is essential: *Garcia v. State*, 26 Tex. 209; 82 Am. Dec. 605. Wrongfully taking the property of another without the owner's consent, and with no apparent purpose of returning it, constitutes larceny: *Robinson v. State*, 113 Ind. 510. In order to constitute larceny, the property alleged to have been stolen must have been carried away from the possession or custody of

the owner, and have come into the possession of the thief: *People v. Meyer*, 75 Cal. 383.

LARCENY — WHAT MUST BE SET OUT IN INDICTMENT. — Indictment must allege the possession from which the property was taken: *Garcia v. State*, 26 Tex. 209; 82 Am. Dec. 605. Indictment, to be good, must allege that the stolen property belonged to some one, — the actual owner, or to one entitled to its possession as bailee, etc.: *People v. Bennett*, 37 N. Y. 117; 93 Am. Dec. 551; *Billard v. State*, 30 Tex. 367; 94 Am. Dec. 317. An information alleging that the thing stolen was the property of a certain woman is sufficient to sustain a conviction, although at the time of the larceny the alleged owner was a married woman, and the article stolen was bought with the money of her husband: *People v. Watson*, 72 Cal. 402. In an indictment for larceny of the clothing of a female eighteen years of age, ownership is properly alleged in the minor, who owned and used the clothing, although she occupied a room with her mother, from which the clothes were stolen: *Phillips v. State*, 85 Tenn. 551. The omission in a complaint, and in the warrant issued thereon, of the christian name of the owner of the alleged stolen property, is an irregularity which respondent might waive, and which could be cured by amendment: *People v. Pline*, 61 Mich. 247.

BARR v. O'DONNELL.

[76 CALIFORNIA, 469.]

EXPRESS TRUST CAN BE CREATED ONLY BY A WRITING, subscribed by the party creating it, under the Civil Code of California.

EXPRESS TRUST IN FAVOR OF GRANTOR CANNOT BE ESTABLISHED BY PAROL EVIDENCE that the grantee agreed to hold the property in trust or to reconvey it.

DEFENSE OF THE STATUTE OF FRAUDS MAY BE TAKEN ADVANTAGE OF BY DEMURRER, if the complaint states that the alleged express trust upon which plaintiff relies rests in a parol agreement to reconvey.

AN INVOLUNTARY TRUST IS DEFINED by the Civil Code as "one which is created by operation of law"; and by the same code, "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." A complaint alleging that the plaintiff and defendant, being tenants in common of a parcel of land, each conveyed to the other a described portion thereof, at the time mutually agreeing by parol that the partition was unequal, and that the defendant should thereafter, on request, reconvey to plaintiff such part as would make the parts owned in severalty by each of equal value, and that defendant, though requested, refuses to so convey, does not disclose facts sufficient to convert the defendant into an involuntary trustee; and a demurrer thereto should be sustained.

ACTION to establish a trust. Judgment for the defendant.

C. B. Darwin and Joseph Kirk, for the appellants.

Hepburn Wilkins, for the respondents.

BELCHER, C. C. This action was brought to establish a trust in relation to certain real property in the town of San Rafael. The defendant interposed a general demurrer to the complaint, which was sustained, and the plaintiff declining to amend, judgment was entered that he take nothing by his action.

The material facts stated in the complaint are as follows: In March, 1879, the plaintiff William Barr and the defendant Connell O'Donnell purchased and became equal owners as tenants in common of a described tract of land. In January, 1881, they divided this tract of land, each conveying to the other, by a deed absolute in form, a described portion thereof. The portion described in the deed to Barr contained 31,388 superficial feet, and the portion described in the deed to O'Donnell contained 57,608 superficial feet. It was not intended that this partition should be final, and at the time the deeds were made it was mutually agreed in parol by and between Barr and O'Donnell "that said O'Donnell should hold the said land in trust to transfer to said Barr, when said Barr should thereafter require him to do so, such portion thereof as would make the parts owned by each in severalty of equal value without improvements, and would thereafter effect such partition of the 'original purchase' as would be equal." In August, 1881, Barr demanded that O'Donnell should convey to him "such portion of said lot which he, O'Donnell, had the legal title to, as would make the interests of each of them of equal value," but O'Donnell declined to comply with the demand.

The prayer is, that O'Donnell be declared to hold the land conveyed to him by Barr in trust, "and that it be ascertained under the direction of the court what portion of the land deeded to O'Donnell in severalty would be sufficient when conveyed to said Barr to make the shares of O'Donnell and Barr, realized from the 'original purchase,' equal in value," and for general relief.

The demurrer was properly sustained.

It is clear that the complaint does not state facts showing an express trust in favor of the plaintiff. Such a trust can be created only by an instrument in writing, subscribed by the party creating it: Civ. Code, sec. 852; Code Civ. Proc., sec. 1971. If land be conveyed by an absolute deed, no express trust in favor of the grantor can be raised by proof of a parol agreement by the grantee to hold the property in trust

or reconvey it: *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; *Gallagher v. Mars*, 50 Cal. 23; *Fouty v. Fouty*, 34 Ind. 433; *Movan v. Hays*, 1 Johns. Ch. 339.

And if it appears from the face of the complaint that the alleged trust rests in a parol agreement to reconvey, the defense of the statute of frauds may be taken advantage of on demurrer: *Ward v. McNaughton*, 43 Cal. 159; *Walter v. Locke*, 5 Cush. 90; *Slack v. Black*, 109 Mass. 496.

Does the complaint state facts showing a trust created "by operation of law"?

Section 2217 of the Civil Code declares that an "involuntary trust is one which is created by operation of law." And section 2224 provides that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

There is no allegation in the complaint that the defendant gained any part of the land in question by any of the wrongful means above enumerated. It is not charged that, at the time of making the partition and interchanging the deeds, either party deceived, misled, or imposed upon the other, but it appears that they executed these conveyances advisedly, and at the same time made a parol agreement that O'Donnell should hold an undefined portion of the land in trust, and retransfer it at some future time to Barr. It is then further charged only that at a subsequent time O'Donnell violated this parol agreement, and refused to retransfer the unascertained and undefined part of the land to which Barr was entitled.

The complaint does not, in our opinion, make a case which comes within the provisions of the code above cited, or within the well-settled rules of law in regard to implied and constructive trusts.

The judgment, we think, should be affirmed. .

FOOTE, C., concurred.

HAYNE, C., concurring. I concur. It is not contended by counsel that the relation between the parties was what the law recognizes as confidential.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

TRUSTS—CREATION BY PAROL.—Declaration of a trust by parol by grantor in favor of the grantee under Mississippi code is void: *Moore v. Jordan*, 65 Miss. 229; 7 Am. St. Rep. 641. A parol agreement made with the owner of land about to be sold for taxes to bid in the land and pay subsequent taxes, and to reconvey to the owner upon payment of the sums advanced, with interest, and a purchase of the land accordingly, does not create an express trust, because such trust cannot be created by parol: *Hain v. Robinson*, 72 Iowa, 735. An express trust in land cannot be established by parol; but a parol agreement to hold the proceeds of a sale of land in trust for another is valid, if upon a sufficient consideration: *Mohn v. Mohn*, 112 Ind. 285. An absolute deed cannot be converted into a trust for the benefit of a stranger by parol evidence, unless it be so clear and certain as to leave no well-founded doubt upon the subject: *Crow v. Watkins*, 48 Ark. 169. A valid express trust of land may be created by parol, but such a trust can be proved by nothing short of written evidence: *McVay v. McVay*, 43 N. J. Eq. 47. Where land is purchased at an execution sale under a deed of trust, under an oral agreement with the debtor whose land is sold that he shall be allowed to redeem, a valid trust is created, which will be enforced; but to engraft such a trust upon the legal title, the proof must be strong and convincing: *McNair v. Pope*, 100 N. C. 404.

TREGEAR v. ETIWANDA WATER COMPANY.

[76 CALIFORNIA, 537.]

SHARES OF STOCK IN A CORPORATION ARE PERSONAL PROPERTY.

MORTGAGES OF PERSONAL PROPERTY WERE VALID AT THE COMMON LAW, and, in many cases, were sustained, without change of possession, in the absence of fraud, even against subsequent *bona fide* purchasers and creditors.

MORTGAGE OF PERSONAL PROPERTY NOT OF A CLASS UPON WHICH THE STATUTE AUTHORIZES SUCH MORTGAGE is nevertheless good between the parties thereto, and against all persons other than creditors of the mortgagor and subsequent purchasers in good faith and for a valuable consideration.

MORTGAGE MAY INCLUDE BOTH REAL AND PERSONAL PROPERTY, and, as to the personalty, is valid between the parties without any change of possession.

PARTIES DEFENDANT.—IN ACTION AGAINST A CORPORATION TO COMPEL IT TO TRANSFER TO PLAINTIFF certain shares of its stock, the person to whose rights plaintiff claims to have succeeded is not a necessary party defendant.

COMPLAINT TO COMPEL A CORPORATION TO TRANSFER CERTAIN SHARES OF ITS STOCK TO PLAINTIFF IS SUFFICIENT, if it alleges that the owner of such stock mortgaged it, without delivering possession thereof to the mortgagee, or making any transfer on the books of the corporation; that the mortgage was foreclosed, and a decree of sale obtained under which the stock was sold to plaintiff, who received a certificate of sale, and afterwards a deed therefor pursuant to such sale. Upon the facts stated, the interest of the mortgagor in the stock ceased on the consummation of the sale as effectually as if he had assigned his shares to the plaintiff.

ACTION to compel the defendant to transfer stock to plaintiff. Judgment for plaintiff on demurrer.

H. C. Rolfe, for the appellant.

Charles R. Gray, for the respondent.

SEARLS, C. J. Plaintiff brought this action against the Etiwanda Water Company, a corporation, to compel said corporation, through its officers, to execute and deliver to him, in his name, a certificate for twenty shares of its capital stock now standing in the name of R. B. Warren on the books of the company.

The complaint shows that R. B. Warren was the owner of twenty shares of the capital stock of defendant, and was registered as the owner thereof on the books of defendant, and held and still holds a certificate therefor in his name, issued by defendant to him; that on the 18th of October he executed a mortgage to one George Chaffey upon certain real estate, together with the stock in question, and certain other stock not in controversy, to secure the payment of a promissory note for two thousand dollars.

The note and mortgage were indorsed, and delivered to plaintiff, who, at the maturity of the note, foreclosed the mortgage, and obtained a decree of sale under which the stock in question and real estate were sold by the sheriff, and purchased by plaintiff, who received a certificate of sale, and at the end of six months, in default of redemption, a deed.

Plaintiff presented his sheriff's deed to defendant, and demanded a transfer of the stock to his name on the books of the company, and that a certificate issue to him, which, as to the twenty shares in dispute, was refused.

That Warren has no interest in the stock, but still stands upon the books of the company as a stockholder therein.

It does not appear that the certificate representing the twenty shares was ever indorsed to, held, or possessed by plaintiff or his assignor, but it still stands in the name of and is possessed by Warren.

Defendant demurred to the complaint, upon the grounds: 1. That the complaint does not state facts sufficient, etc.; 2. Defect of parties defendant in not joining Warren and the president and secretary of defendant; 3. That it is unintelligible as to what is meant by the order of sale issued upon the judgment, and in pursuance of which the sale was made by the sheriff.

The contention of appellant is: 1. That shares of capital stock of a corporation are personal property; 2. That they are not the kind of personal property that can be mortgaged.

Shares of stock in a corporation are certainly personal property.

At common law, personal property could not only be mortgaged, but mortgages of such property were in many cases held valid, without change of possession, in the absence of fraud, even against subsequent *bona fide* purchasers and creditors: *Holbrook v. Baker*, 5 Me. 309; *Bissell v. Hopkins*, 3 Cow. 166; 15 Am. Dec. 259; *Bucklin v. Thompson*, 1 J. J. Marsh. 223; *Letcher v. Norton*, 5 Ill. 575; *Homes v. Crane*, 2 Pick. 610.

We are not aware of any case in which, independent of some statute, it has been held that a sale of personal property, and retention of possession thereof by the vendor or mortgagor, is void as between the parties thereto.

The great contest which has been waged upon questions growing out of the retention of possession of personal property by the vendor or mortgagor after a sale or mortgage has been, not between the parties, but between the creditors of the mortgagor or vendor on the one hand, and the parties on the other.

This contest, from the days of the celebrated *Twyne Case*, 3 Coke, 80, was continued in England for several generations, and resulted in an adjudication of the question in all its phases.

We inherited it from our English ancestors, and the courts of the several states have been called upon to go over much of the same ground.

In most of the states of our Union, statutes have been passed setting at rest the more important questions involved in the problem.

Section 3440 of our Civil Code declares every transfer of personal property, and every lien thereon, with few exceptions, where made by a person in possession, and not accompanied by an immediate delivery, and followed by a continued change of possession, of the things transferred, to be fraudulent, and therefore void, as against creditors, etc.

The statute does not attempt to determine the effect of the transfer as between the parties, but only as to creditors, their successors in interest, trustees, etc., leaving the rule as it before existed between the parties.

The property involved here is not of the class upon which a chattel mortgage, as defined by statute, may be given. It

may, however, as been the parties, be mortgaged. The fact that the mortgage included both real and personal property is of no significance.

We are of opinion that, as between the parties thereto, the mortgage of the twenty shares of the capital stock was valid and binding without the delivery of possession. It would, of course, under our statute, have been void as to creditors and subsequent purchasers in good faith for a valuable consideration, but there are no such persons here complaining.

We fail to see wherein R. B. Warren, the mortgagor, is a necessary party defendant. In equitable actions there is a marked distinction between proper parties and necessary parties defending.

Necessary parties are those without whom no decree can be made determining the principal issues in the case.

Proper parties are those without whom a substantial decree may be made, but not one which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation.

A decree cannot bind one who is not a party to the action; and by making him a party, he may frequently be bound, and questions as to him determined which would otherwise remain open and subject to future adjudication.

Parties to the main issue or issues to be determined, and which are essential to any valid decree, are necessary parties; those who are only interested in subordinate or collateral questions are proper parties,—that is to say, persons who may or may not be made parties.

The failure to make the latter parties defendant is not cause for demurrer: Pomeroy on Remedies, secs. 329 et seq.

Warren is to be treated as the vendor of the plaintiff, who, through his agent, the sheriff, sold his stock in the corporation to plaintiff. Upon the facts as stated in the complaint, his interest in the subject-matter ceased upon the consummation of the sale as effectually as though he had in person assigned his shares to the plaintiff.

If there were any reasons why such assignment, apparently valid, was not so in fact, it was a matter of defense to be set up by way of answer, and then, and on such showing, if it appeared to the court that Warren was a proper party defendant, it would have been the duty of the court, under section 889 of the Code of Civil Procedure, to order him brought in.

We are of opinion the complaint states facts sufficient to constitute a cause of action against the defendant; that there is no apparent defect of the necessary parties defendant; and that the complaint is not amenable to the charge of being unintelligible.

The practice of the courts in this state in directing the sale of encumbered property under foreclosure proceedings has not been uniform.

A copy of the decree duly certified, and which gave full directions as to the time, place, manner of sale, etc., was said to be sufficient in *Heyman v. Babcock*, 30 Cal. 367.

Under section 684 of the Code of Civil Procedure, a writ reciting the judgment or the material part thereof, and directing the officer to execute the judgment, by making the sale, etc., is the proper course.

By analogy to the former equity practice, this writ is usually termed an order of sale. Plaintiff so calls it in his complaint, and, as we think, properly.

The judgment appealed from is affirmed.

CHATTEL MORTGAGES — WHEN VALID WITHOUT DELIVERY OF PROPERTY. — Mortgage of personalty is valid as between the parties thereto without delivery of the mortgaged property: *Bryant v. Carson etc. Co.*, 3 Nev. 313; 93 Am. Dec. 403; *Allen v. McCalla*, 25 Iowa, 464; 96 Am. Dec. 56. An agreement not in writing, to convey personal property as security, may be regarded as an oral mortgage, and when inquired into between the parties thereto, or between parties having no greater or different rights, will be held to be valid without the actual delivery of the personalty so conveyed: *Bates v. Wiggin*, 37 Kan. 44.

CORPORATIONS — PURCHASER OF STOCK. — A purchaser from original subscriber to stock is substituted to his obligations as well as his rights, and being accepted by the corporation as a stockholder, a privity is established between them: *Merrimac Mining Co. v. Levy*, 54 Pa. St. 227; 93 Am. Dec. 697.

WOOD v. STROTHER.

[76 CALIFORNIA, 545.]

MANDAMUS WILL SOMETIMES ISSUE TO CONTROL A DISCRETION. It properly issues to correct an abuse of discretion, if the case is otherwise proper.

MANDAMUS. — IT IS NOT UNIVERSALLY TRUE that this writ will not issue to control judicial action, or to compel a tribunal to whom the examination of a matter is intrusted to act in a particular way.

MANDAMUS MAY PROPERLY ISSUE TO COMPEL AN OFFICER TO ACT IN A PARTICULAR MANNER, though, in the exercise of a discretion conferred on him, he has determined not to so act, if, from an examination of the law, the court is of the opinion that the law did not intend his action to be

final, and further, that there is no other "plain, speedy, and adequate remedy."

MANDAMUS WILL ISSUE TO COMPEL AN AUDITOR TO COUNTERSIGN A WARRANT FOR A STREET ASSESSMENT, although the statute under which he is acting declares that he, before countersigning such warrant, "shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair." The word "fair" adds nothing to the force of the word "legal." Therefore, if the proceedings are, in the opinion of the court, legal, it will compel the auditor to regard them as legal and fair, and to act accordingly.

A SECOND ASSESSMENT FOR STREET WORK MAY BE MADE if the first is declared invalid, and the prior proceedings are sufficient to support it. If some of the property owners have paid the first assessment, such payments may be treated as advance payments on the second.

George Flourney, Jr., and John L. Love, for the appellant.

J. C. Bates, for the respondent.

HAYNE, C. This is an appeal from a judgment awarding a writ of *mandamus* to the auditor of San Francisco to countersign a street-assessment warrant under the act of 1872. That act provides that the warrant shall be countersigned by the auditor, "who, before countersigning it, shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair": Laws 1871-72, p. 813, sec. 10.

The word "fair" seems very loosely used in the above provision. In common usage it would convey some idea of justice or equity. But it is not possible that it could have been intended that in a case where the proceedings are legal, — that is to say, in accordance with the requirements of the act, — the auditor could refuse to sign upon the ground that the law was not just, or upon his own undefined notions of fairness. The word, therefore, adds nothing to the force of the word "legal," but is one of those expressions which are put in for the sake of the sound, and which convey no definite meaning.

With reference to the legality of the proceedings which the auditor is to examine, viz., "the contract, the steps taken previous thereto, and the record of the assessments," we think there can be no doubt but that if a competent court finds, after examination, that they are illegal, it will not compel the auditor to sign the warrant. The first question, therefore, is, whether the proceedings were illegal.

We see no illegality in them. The first defense states that

the defendant "has no information or belief upon the subject sufficient to enable him to answer," and therefore he denies, *seriatim*, that the various proceedings set forth in the complaint were taken. The second defense avers "that he has examined said contract, and the steps taken previous thereto, as they are set out and referred to in said petition, and the record of said assessment mentioned in said petition, and is not satisfied that the proceedings upon which the same is based are or have been legal or fair." It is to be observed of these two defenses that they are not necessarily inconsistent; for the second does not specify wherein the proceedings are illegal, nor does it say that the auditor is satisfied that they are so. It simply says that he has not made up his mind on the question. But it would make no difference if the defense had set up that he was satisfied that the proceedings were illegal; for the court finds facts which show that the steps required by the street law were taken. The appeal is from the judgment only, and none of the evidence is brought up. The findings, therefore, are to be taken to be true; and it follows that the proceedings were "legal."

The second and third defenses set up matters which are outside of the proceedings referred to by the section under which the auditor acted, namely, that a former assessment had been made for the same work, and that "the greater part of the amounts therein assessed were many years since paid to and collected by plaintiff or his assignor, and that the plaintiff had lost his right by lapse of time." The court finds that no valid assessment had previously been issued. If there was a previous assessment which was invalid, that would not, of itself, be a reason why a valid assessment should not be made, if the prior proceedings are sufficient to support it: *Himmelmann v. Cofran*, 38 Cal. 412. Nor would the fact that some of the property owners had paid their proportion before the invalidity was discovered affect the question. Such payments would be regarded as payments in advance; and the contractor would not be allowed to collect the sums over again any more than the holder of a note who has received payment before it was due would be allowed to do so. If the contractor should refuse to discharge the lien of record, a court of equity is amply competent to afford the necessary relief. The fact that some have paid in advance can afford no protection to those who have not paid.

Nor is the lapse of time a sufficient reason why the audi-

tor should refuse to sign. The act fixes no time in which the assessment must be made: *Dyer v. Scalmanini*, 69 Cal. 640. Doubtless it must be done in a reasonable time. But the question of reasonableness of time is to be determined upon a consideration of all the circumstances. An apparently unreasonable delay might be explained by evidence. It does not seem to us that the auditor is charged with the duty of conducting an investigation into such outside circumstances. And if it be said that the writ of *mandamus* issues only in the discretion of the court, or, as it is sometimes said, is a "prerogative" writ, the answer is, that we cannot say that there was an unreasonable delay. There was considerable litigation over the first assessment, which was not declared void until May 30, 1883. The second assessment was made May 12, 1885. We do not think that the lapse of time should deprive the party of his assessment.

The proceedings being "legal," the auditor was wrong in his refusal to countersign the warrant; and the remaining question is, whether he can be compelled to sign by the writ of *mandamus*,—in other words, whether *mandamus* is the proper remedy. The learned counsel for the appellant has directed most of his argument to this question. The argument against the writ is, in substance, that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal, before signing; and that if he has examined them and become satisfied that they are not legal, the most that can be said is, that he has committed an error in a matter confided to his discretion, and that the function of the writ is not to review such exercise of discretion.

It must be acknowledged that this argument is exceedingly plausible. There are innumerable cases in which it has been laid down that *mandamus* cannot issue to control discretion. The rule—which is undoubtedly correct when properly understood—has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth, but they express it in an inaccurate and misleading manner; and by reasoning from them as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts "minis-

terial" which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases.

Thus it is not accurate to say that the writ will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper: *Ex parte Bradley*, 7 Wall. 377; *State v. Lafayette Co.*, 41 Mo. 226; *Village of Glencoe v. People*, 78 Ill. 389; *People v. Superior Court*, 10 Wend. 285; *Stockton R. R. Co. v. Stockton*, 51 Cal. 339; *Tapping on Mandamus*, *14.

So while in one sense it is correct to say that the writ cannot be made to perform the functions of a writ of error, in another sense it is not; for, as was said by Chief Justice Marshall in *Ex parte Crane*, 5 Pet. 193, "a *mandamus* to an inferior court of the United States is in the nature of appellate jurisdiction: See also *People v. Bacon*, 18 Mich. 253.

So it is not universally true that the writ will not issue to control judicial action, or to compel a tribunal to whom the examination of a matter is intrusted to act in a particular way. The cases in our own state show this. Thus in *Russell v. Elliott*, 2 Cal. 245, the writ issued to compel a judge to enter judgment upon the report of a referee. Here the judge had examined the matter, and had arrived at the conclusion that it was not proper that the judgment should be entered upon the report. But the higher court differed with him, and commanded him to do what, as a judge, he had refused to do.

So in *Merced Mining Co. v. Fremont*, 7 Cal. 130, the writ was issued to compel the judge of a district court to issue an attachment for contempt in disobeying an injunction. A motion had been made to the judge to commit the offender, but the judge had decided that he could not do so. Here the matter was certainly to be determined by the judge in the first instance. He erred in his conclusion. And to say that a correction of such error by *mandamus* is not revising judicial action, or not compelling the judge to act in a particular way, is a misuse of language.

So it is well settled that a *mandamus* may issue to compel a judge to sign a bill of exceptions: *People v. Lee*, 14 Cal. 510; *People v. Rosborough*, 29 Id. 416; *People v. Keyser*, 53 Id. 184; *Lin Tai v. Hewill*, 56 Id. 118; *People v. Crane*, 60 Id. 279. Whether the party has a right to have a bill, or whether it is in time, are certainly judicial questions, and they are to be decided in the first instance by the judge, who, if he decide

them correctly, will not be compelled by the writ to take back his decision: *Clark v. Crane*, 57 Cal. 629. Is anything gained by calling such decision a "ministerial" act?

So in *Stockton R. R. v. Stockton*, 51 Cal. 329, a *mandamus* was issued to compel the delivery of certain bonds, although the act provided that the bonds were to be delivered upon certificate of the council that the "road has been constructed and the track laid in a manner and of a character acceptable to them."

Decisions similar in principle have been made in other courts.

In *King v. Justices of West Riding*, 5 Barn. & Adol. 667, the writ issued to compel the justices of the West Riding to hear an appeal which they had dismissed, upon the ground that a certain notice had not been given. Parke, J., said: "We have no right to interfere with the discretionary power of the sessions; where they have that power, their discretion is to be confided in. But the question what is such reasonable notice as gives them jurisdiction to entertain an appeal is a legal question, of which they are not the exclusive judges; and this court will see that in determining such a point they act legally and according to the jurisdiction which they possess." In *Regina v. Recorder of Liverpool*, 1 Eng. L. & Eq. 294, the foregoing seems to have been limited to cases where the erroneous decision was upon preliminary matters. The court, per Patteson, J., said: "*Queen v. Goodrich* draws the true distinction, that where any preliminary step is necessary in order to give the court of quarter sessions power to hear the appeal, and the court comes to a wrong conclusion of law, not of fact, in respect to that preliminary step, this court will interfere by *mandamus*." The doctrine of the foregoing cases was approved in *Castello v. St. Louis Circuit Court*, 28 Mo. 274, in which the court declared that it had seen no American cases to the contrary.

In New York, where the formulas as to discretion, judicial action, etc., have often been repeated, it has been held that the writ may issue to compel a judge to vacate an order granting a new trial upon the ground of newly discovered evidence, which order was in violation of the established rules that there must be no laches, and that the newly discovered evidence must not be cumulative merely,—there being no other adequate remedy: *People v. Superior Court*, 10 Wend. 285; 5 Id. 114. So where the court of common pleas set aside the

report of referees upon the merits, and erred in doing so, the writ issued to correct the error: *People v. Niagara C. P.*, 12 Id. 246. So where the court of common pleas granted the plaintiff leave to amend his declaration, but, under an erroneous view of the law, refused to grant leave to the defendant to plead, a higher court (per Bronson, J.) awarded a *mandamus* commanding the inferior court either to allow the defendant to plead or refuse to allow the declaration to be amended: *People v. New York Court of Common Pleas*, 18 Id. 534.

In Michigan the rule as to discretion, etc., prevails: See *Houghton County v. Auditor-General*, 36 Mich. 273; *Parks v. Marquette Co. Judge*, 38 Id. 244; *Wells v. Circuit Judge*, 39 Id. 21; *Chicago and North Eastern R. R. v. Circuit Judge*, 40 Id. 168; *Stork v. Judge of Superior Court*, 41 Id. 5. Yet in that state the writ has issued in the following cases: To compel a judge to set aside a judgment rendered against the relator because of an illegal notice of trial: *People v. Bacon*, 18 Id. 247; to compel a court to vacate an order overruling a motion for relator's discharge from arrest: *Watson v. Superior Court*, 40 Id. 730; to compel a judge to vacate an injunction: *Van Norman v. Jackson Circuit Judge*, 45 Id. 205; to compel a judge to vacate an order denying a motion to amend a record: *Frederick v. Mecosta Circuit Judge*, 52 Id. 529.

In Alabama the rule as to discretion prevails: See *Ex parte South and North Ala. R. R. Co.*, 44 Ala. 655, 656. But in that state the writ has issued in the following cases: In *Ex parte Lowe*, 20 Id. 330, the court had granted a new trial upon condition that costs were paid within a certain time. The costs were paid, but not, as was claimed, within the time prescribed by the order. The court took this view, and made the judgment absolute. The higher court considered that the view of the lower court was erroneous, and awarded a *mandamus* to compel a new trial.

So where a court gave an improper construction to a stipulation of record, and ordered a trial where it ought to have ordered a judgment in accordance with the stipulation, the writ was issued to compel a judgment: *Ex parte Lawrence*, 34 Ala. 446.

So the writ was issued to compel a probate judge to approve a bond which had been tendered to him, and which he had refused to approve: *Ex parte Candee*, 48 Ala. 387; and to compel a chancellor to reinstate a bill which he had ordered stricken from the docket: *Ex parte State ex rel. Stow*, 51 Id. 69.

And decisions similar in principle have been made in other states.

In *Ex parte Pile*, 9 Ark. 336, a judge was compelled by the writ to issue an injunction which he had refused to issue. In *State v. McArthur*, 13 Wis. 407, the writ issued to compel a change of venue. In *Commonwealth v. Sessions of Norfolk*, 5 Mass. 435, it issued to compel a justice to accept a verdict and render judgment thereon. And see also *State v. Lazarus*, 36 La. Ann. 579; *Commonwealth v. Sessions of Norfolk*, 9 Mass. 388; *Rand v. Townshend*, 26 Vt. 670; *Delaney v. Goddin*, 12 Gratt. 266; *Gresham v. Pyron*, 17 Ga. 263; *Ex parte Martin*, 5 Ark. 371; *Barnett v. Warren Circuit Court*, Hardin, 172.

In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to control judicial action, or to compel a tribunal to act in a particular way. It is by no means intended to assert that the writ could issue in this state in all the cases above referred to. The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final; and if not, upon whether the system of practice furnishes any other adequate remedy. These things might be different in different states; but the cases cited serve to show that the formulas above mentioned are not universally and literally true, and that it is dangerous to reason from them as if they were so.

In every case the tribunal that is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final, and if not, whether there is any other "plain, speedy, and adequate remedy." If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on *mandamus* or in any other way. If it was not intended to be final, but there is another "plain, speedy, and adequate remedy," the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has

established no specific remedy, and where, in justice and good government, there ought to be one": *Rex v. Barker*, 3 Burr. 1268; see also 3 Bla. Com. 110; Tapping on Mandamus, 9; *Commonwealth v. Sessions of Hampden*, 2 Pick. 418.

It will generally happen that where discretion is committed to an officer, or where a judicial tribunal is called upon to act, its determination is either final or only subject to review in certain prescribed ways. But, as above shown, this is not universally true; and it is dangerous to reason as if it were so. The ultimate test is, in our opinion, as we have stated.

In the present case there can be no doubt that the auditor was to examine the proceedings and satisfy himself that they were legal, for the statute expressly says so; and if they were found by the court to be illegal, the writ could not issue. But being perfectly legal, the question is, whether the determination of the auditor was intended to be final. And we can see no ground for saying that it was. There is nothing in the language of the act which shows that it was intended to be final. It certainly would not be final in favor of the contractor. In the numerous cases in which street assessments have been before the court, we have never seen it suggested that the signature of the auditor cured previous illegality; and it seems clear that it would not do so. Why, then, should it be final against the contractor, and be conclusive that the proceedings are illegal when it is apparent that they are not so? If the auditor's determination of this purely legal question were intended to be final, it would have been natural for the charter to have given the parties interested a hearing. Nothing of the kind is provided. The proposition therefore must go to this extent, that the auditor is clothed with absolute and despotic authority over the rights of the contractor. We are not prepared to go so far.

If the determination of the auditor be not final, then, upon the principles above stated, the writ must issue; for, under the street law, the failure to sign the warrant brings the proceedings to a complete stop, and there is no other remedy in law or equity.

We advise, therefore, that the judgment be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

MANDAMUS. — MANDAMUS WILL NOT LIE TO REVIEW ACT OF AN OFFICER, when the duty he is called upon to perform requires the exercise of his discretion. —
AM. ST. REP., VOL. IX. — 17

cretion: *Sansom v. Mercer*, 68 Tex. 488; 2 Am. St. Rep. 505, and note 510. The rule that *mandamus* will not lie to control discretion or revise judicial action has no application to the determination of preliminary questions relating to the settlement of a statement on motion for a new trial: *State v. Keane*, 19 Nev. 89. As incident to and in aid of its appellate jurisdiction, the supreme court has the power by *mandamus* to require a circuit judge to settle and allow a bill of exceptions: *The Gong v. Stearne*, 16 Or. 219. *Mandamus* will lie to set a court in motion, but not to control the result: *Shine v. Kentucky etc.*, 85 Ky. 177. *Mandamus* will not lie to compel the superior court, on the trial of an appeal from justice's court, to admit certain evidence which had been offered and rejected: *Scott v. Superior Court etc.*, 75 Cal. 114. In acting on an application for a license to retail spirituous liquors, a probate judge acts in a *quasi* judicial capacity; and his refusal to grant the license, though erroneous, or founded on insufficient reasons, cannot be revised or reviewed by *mandamus* from the circuit court: *Ramagnano v. Crook*, 85 Ala. 226. *Mandamus* will lie to compel district judge to grant an injunction *in limine* to any purchaser whose property is seized for the payment of the price of a thing sold to him, whenever suit has been instituted against him for the recovery of the property: *State v. Judge of Eleventh District etc.*, 40 La. Ann. 216.

[IN BANK.]

VAN EMON v. SUPERIOR COURT.

[76 CALIFORNIA, 589.]

FUNERAL EXPENSES OF A DECEDENT INCLUDE A TOMBSTONE ERECTED OVER HIS GRAVE. The court having jurisdiction over the settlement of his estate may therefore allow as part of his "funeral expenses" moneys expended by the administrator in erecting a monument.

Brown and Daggett, for the petitioners.

F. S. Stratton and N. O. Bradley, for the respondent.

SHARPSTEIN, J. This is an application for a writ of review. The respondent in a probate proceeding made an order authorizing Robert Baker, administrator of the estate of John W. Miller, deceased, to cause a monument to be erected at the grave of deceased at an expense not exceeding fifteen hundred dollars. Petitioners, who are heirs of deceased, asked to have said order annulled on the ground of want of jurisdiction in the court to make it. The contention of petitioners is, that the jurisdiction of superior courts in matters of probate is defined by statute, and that the statute does not authorize the erection of monuments at the graves of deceased persons at the expense of their estates. It authorizes the payment of funeral expenses, but petitioners insist that the cost of the erection of a monument is not any part of the funeral expenses. The answer to

this is that courts and law-writers have so treated it. In case of the appeal of *Ann McGlinsey, Administratrix of John McGlinsey*, 14 Serg. & R. 64, the orphans' court struck out a credit claimed for funeral expenses of the deceased. The appellate court said: "A handsome tombstone was erected over the vault in which the body was interred, and this was the principal article of expense." The court held that that should have been allowed.

In *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469, the court said: "They [the vouchers] all relate to a box tomb of marble, lettered and inscribed, which the administrator caused to be erected over the grave of the deceased. . . . This may well be classed under the head of funeral expenses."

In *Ferrin v. Myrick*, 41 N. Y. 325, the court, after saying it was the duty of the executor to pay funeral expenses, added: "And it has been well held that suitable gravestones are a part of such expenses."

In *Fairman's Appeal*, 30 Conn. 209, the court said that the sums paid for tombstones "should be considered a part of the funeral expenses."

We think the court had jurisdiction to authorize the erection of a monument, and that is the only question which we can consider on the application for a writ of review.

The demurrer to the petition is sustained, and the proceeding dismissed.

FUNERAL EXPENSES. — PAYMENT FOR DECEDENT'S TOMBSTONE MAKES ONE a creditor of the estate, not of the deceased: *Holland v. Wheaton*, 6 La. Ann. 443; 26 Am. Dec. 481. As to who is liable for payment of funeral expenses, see note to 9 Am. Dec. 652.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

ESTEP v. COMMONWEALTH.

[86 KENTUCKY, 89.]

ONE HAS THE RIGHT TO DEFEND HIMSELF IN HIS OWN DWELLING-HOUSE, and is not required to escape therefrom when assaulted therein, if he believes, and has reasonable ground to believe, another is about to take his life, or inflict great bodily harm upon him.

ONE HAS THE RIGHT, IN HIS OWN DWELLING-HOUSE, TO RESCUE AND DEFEND HIS WIFE, EVEN TO TAKING LIFE, where she is being assaulted and beaten, and he at the time believes, and has reasonable grounds to believe, she is in immediate danger of losing her life, or suffering great bodily harm.

Connelly and Cline, and R. T. Burns, for the appellant.

P. W. Hardin, attorney-general, for the appellee.

LEWIS, J. Appellant, being indicted for the murder of Martin Scarberry, brother of his wife, was convicted of manslaughter, the homicide occurring, according to the testimony, under the following circumstances:—

The residences of the two were not much more than a quarter of a mile apart; and on the day of the killing, the wife of the deceased, leaving him a short distance from it, went alone into the dwelling-house of appellant, where he, his wife, and others were, and without speaking to any of them, seized a tin cup, whereupon appellant's wife said to her she took a good deal of authority there, to which she replied that she took enough to get her things, and would also take her tea-kettle, and the other then told her to take her things, get out of the house, and stay out. She did then go out, but soon

returned with a rock under her apron, took a seat, and remarked she intended to stay there an hour for aggravation. The two women, between whom there appears to have been ill-feeling, then renewed the quarrel, but what was said by them does not appear. While they were thus engaged, the deceased rapidly approached the house, having rocks in his hands; but when near to it he sat down on a log, and after sitting there a moment, he sprang into the house, and jumping up two or three times, he said, with an oath, having the rocks still in his hands, he was the best man who ever jumped into that house. Thereupon his wife threw the rock she had under her apron at the wife of appellant, which struck the wall of the house near her head. The two women then clinched each other and fell upon the floor, and the wife of the deceased, having the advantage, commenced to beat the other in the face with her fist. Appellant, who does not appear, from the testimony, to have previously said or done anything, then went up to the deceased, and putting his hand on his shoulder, said: "Martin, old brother, you take your wife out of here, and I will take care of mine, and let us have no fuss; peace is the best thing." To the which deceased replied, with an oath, he had come there for satisfaction, and was going to have it. He, in that connection, in the language of the witness, asked appellant "about some talk"; in reply to which the latter said "he had not had it," and asked if that would not satisfy him. But the deceased again said he had come there for satisfaction, and was going to have it. Appellant then started as if going to part the women, who were still fighting, when the deceased pushed him back, saying: "G—— d—— you, stand back, or I will kill the last G—— d—— one of you." A woman present testifies that she also started to part the women, but was likewise shoved back by the deceased, who then threw up his right hand, still having the rocks, and was at that time shot by appellant with a pistol, the ball entering his back, as the witnesses say, where the suspenders crossed, and, from the effects of the shot, he died in a few days. The two women continued to fight after the shot was fired until parted by appellant and the woman who had before attempted to do it.

The evidence shows that the deceased was the best man in the neighborhood as to physical strength, and his character for violence was bad.

As the jury alone have the right to judge of the weight to

be given to the evidence and the credibility of the witnesses, the only question before us is, whether the lower court properly and fully instructed as to the law applicable to the case.

In the third instruction it is made a condition of the right of appellant to take the life of the deceased, that he had no other safe or apparently safe means of escape from the impending danger to himself.

The instruction in that particular is erroneous and misleading. For it implied a duty of appellant to escape, even by leaving his own dwelling-house, which had been entered by the deceased in a lawless manner, and with what was equivalent to a threat of violence to the inmates. Whereas, he was not required to leave it, but had the right to stand his ground and defend himself as well as the inmates of his house.

In the fourth instruction, the right of the appellant to stand and defend himself is made to depend upon the fact that the deceased had sought him out for the purpose and with the intent to kill him, or inflict great bodily harm, and was, when the fatal shot was fired, manifesting an intention to commence the attack. No such conditions are or should be annexed to the right of a person to defend himself when assaulted in his own dwelling-house; nor is he in any case required to retreat therefrom to avoid his assailant; but if he believes, and has reasonable grounds to believe, one is about to take his life or inflict great bodily harm upon him in his own dwelling-house, he has the right to defend himself then and there, and is not required to escape therefrom.

Instruction No. 2, asked by appellant and refused by the court, it seems to us, is even less favorable to the appellant than he was entitled to have it. It is as follows: "If they believe, from the evidence, that at the time of the difficulty the wife of the deceased was making an assault upon the wife of the defendant, and that the deceased was present, aiding and abetting his said wife in making said assault, and that the defendant believed, and had reasonable grounds to believe, that death or great bodily harm was then about to be inflicted upon his wife, he had a right to use all necessary means to protect his wife, even to slaying the deceased."

We are unable to perceive upon what ground the lower court refused that instruction; for the defendant was certainly entitled to an instruction embodying substantially the principle contained in it. It certainly could not have been upon the supposed want of evidence that the deceased did aid and

incite his wife in making the assault; for she did not throw the rock with which she had armed herself until the deceased had forcibly and violently entered the house similarly armed, and obviously with hostile intent. Moreover, when appellant requested him to take his wife away, that there might be peace, he refused to do so, and even with force prevented appellant from separating the two women.

But, in our opinion, it was not necessary that the deceased should have aided and abetted his wife in making the first assault with the rock upon the wife of appellant, in order to give to the latter the right to rescue his wife from her assailant, and defend her against further violence. His wife having been unlawfully assaulted with a rock, and then being beaten in his own house, he had the unquestionable and unconditional right to go to her rescue and defense, and if by force or threats the deceased endeavored to prevent him, he had the right to oppose force to force; and if he at the time believed, and had reasonable grounds to believe, his wife was in immediate danger of losing her life or suffering great bodily harm, he had the right to use whatever reasonable means were necessary, or reasonably appeared to him to be necessary, to rescue or defend her, even to taking the life of the deceased.

For the errors indicated the judgment is reversed for a new trial, and further proceedings consistent with this opinion.

RIGHT OF PERSON TO DEFEND HIMSELF within his own dwelling-house: See *Jones v. State*, 8 Am. St. Rep. 449, and note 450. Homicide in defense of one's property is justifiable when necessary to defeat or prevent a felonious aggression thereon: *People v. Flanagan*, 60 Cal. 2; 44 Am. Rep. 52.

ANDERSON v. CINCINNATI SOUTHERN RAILWAY.

[88 KENTUCKY, 44.]

ALTHOUGH RIPARIAN OWNER MAY WITHDRAW WATER FROM A STREAM BY ORDINARY MEANS, or by artificial channels, for the purpose of supplying the wants of men and animals, even to the extent of producing a material diminution in the force and volume of the current, yet it cannot be withdrawn for the purpose of irrigation or for any other secondary and artificial purpose, except in such a reasonable and legitimate way as not to interfere unjustifiably with its general use, and this principle applies to a railroad corporation which constructs a dam to supply locomotives and for the use of the railroad.

IN ACTION FOR UNLAWFUL OBSTRUCTION AND DIVERSION OF WATER BROUGHT AGAINST RAILROAD CORPORATION, IT IS NO DEFENSE that

defendant had leased its road, and that it was not in possession or control of the dam which was alleged to be the means by which the water was obstructed and diverted.

UNDER THE KENTUCKY STATUTE, ONE WHO ERECTS A MILL OR MANUFACTORY ON A WATERCOURSE ACQUIRES a vested right which cannot be lawfully infringed by any other person or corporation, or taken or applied to public use, without just compensation being previously made.

RIPARIAN RIGHTS. — UNDER THE KENTUCKY STATUTE, ONE CONSTRUCTING A DAM MAY BE FULLY PROTECTED AGAINST CLAIM FOR DAMAGES by application to the county court to construct said dam, and the payment to riparian proprietors, above and below, of the damages sustained by them on account of building said dam; but a dam may be constructed without making such application, though if in doing this one obstructs the natural flow of water so as to lessen the supply of his neighbor below or to overflow his land above, he must answer in damages.

Curd and Waddell, and Parker and May, for the appellant.

Morrow and Newell, and C. B. Simrall, for the appellee.

LEWIS, J. Appellant is the owner of a water grist-mill, erected by him in 1872, on Pittman's Creek, under an order of the Pulaski County court granting the leave as provided by law in such cases. Across the same creek, about one mile below its source, and two miles above appellant's mill, appellees, the trustees of the Cincinnati Southern Railway, under charter granted by the general assembly, subsequently built their road, and at the same time erected just above the railroad crossing a wooden dam four feet high, by which a reservoir was formed from which water was taken to a supply tank, to be used in running their trains. But in 1877 or 1878, several years after the completion of their road, they erected in place of the wooden dam one built of stone, laid in cement, fourteen feet high, by which a reservoir was formed covering ten or eleven acres of land purchased by them of the riparian owner.

This action was brought by appellant against appellees for the alleged wrongful and unlawful obstruction and diversion, by reason of the stone dam, of water that hitherto flowed to and supplied the power for the operation of his mill, whereby, as he states, he has been injured, and to a great extent deprived of the use and enjoyment of said mill.

For their defense, appellees answer,—1. That since July, 1877, the railroad built by them, together with its franchises, appurtenances, etc., including the stone dam and reservoir, has been leased by them to the Cincinnati Railway Company and the Cincinnati, New Orleans, and Texas Pacific Railway

Company, and appellees have not since that time been in the possession or had control of the dam or reservoir, and are not therefore liable for the injury complained of; 2. They deny that the flow of water to appellant's mill has, to any extent, been prevented or delayed by the erection of the stone dam; and state that there is no stream of water having channel or banks above the point where the dam is located, the reservoir being supplied with water by surface drainage at times of heavy rains, and that if the water which flows above the dam was unobstructed, it would not in any way affect appellant's mill, because the quantity during a portion of each year is so small as, even when added to that below, to be insufficient to run the mill, while during the residue of the time, the quantity flowing below is sufficient to operate it as fully as if the dam had not been erected.

In our opinion, the first defense is not available.

The stone dam, which it is alleged by appellant obstructs and diverts the natural and accustomed flow of water to his mill, was erected by appellees as an appurtenance to their road, and being the primary and continuing cause of the injury complained of, there can be no question of his right to maintain this action against them for whatever damage has been unlawfully caused thereby. How far the lessees of the railroad may be liable, if at all, for taking the water already obstructed by the dam of appellees, and using it in operating their trains, is a question not now presented.

The right of every riparian owner to the enjoyment of a stream of running water in its natural state, in flow, quantity, and quality, is now well established.

"Every proprietor of lands on the banks of streams has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it is wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit, et debet currere ut currere solebat*, is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quan

tity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years [fifteen under our statute], which is evidence of it. This is the clear and settled general doctrine on the subject. All the difficulty that arises consists in its application": 2 Kent's Com. 439.

"The primary use of water is for natural and domestic purposes, and each proprietor of the land through which it flows may use as much of it as is necessary for those purposes, even if it be entirely consumed in the use; but he is limited as regards other purposes to a reasonable and proportionate use, which must not be such as to exclude others from a benefit to which they are equally entitled with himself": *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391; *Evans v. Merriweather*, 3 Scam. 492; 38 Am. Dec. 106; *Arnold v. Foot*, 12 Wend. 330; *Davis v. Fuller*, 12 Vt. 178; *Mayor of Philadelphia v. Commissioners of Spring Garden*, 7 Pa. St. 348.

Water may, by a riparian owner, be withdrawn from a stream by ordinary means, or by artificial channels, for the purpose of supplying the wants of men and animals, even to the extent of producing a material diminution in the force and volume of the current. But it cannot be withdrawn for the purpose of irrigation, or for any other secondary and artificial purpose, except in such a reasonable and legitimate way as not to interfere unjustifiably with its general use: *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Id. 420; 7 Am. Dec. 160; *Cook v. Hull*, 3 Pick. 269; 15 Am. Dec. 208; *Anthony v. Lapham*, 5 Pick. 175; *Evans v. Merriweather*, 3 Scam. 492; 38 Am. Dec. 106.

It has always been the policy in this state to encourage the building of water-mills, and being considered of "public use," the exercise by the legislature of the right of eminent domain in favor of them has never been called in question by the courts.

By section 1, chapter 77, General Statutes, which is substantially the same as section 1 of the act of 1797, continued in force by the Revised Statutes, it is provided that "a person owning land on a watercourse, the bed whereof belongs to him or the commonwealth, and desiring to build on such land a grist-mill, or other mill or manufactory, useful to the public, and needing a dam in or across the watercourse, or the raising of an established dam, or the cutting or enlarging of a canal

above or below, may, by petition, in writing, filed in the county court of the county in which is situated the principal part of the land asked to be condemned, obtain therefrom a writ of *ad quod damnum* for the purpose of making the necessary condemnation, which shall embrace all the land demanded, whether lying in the same county or not."

But by subsequent sections of the same chapter it is provided that such leave shall not be granted if thereby the mansion-house of any other than the applicant, or the out-houses, or any part of the yard, garden, or orchard thereto belonging, will be overflowed or taken, or that any other legally established mill will be materially injured thereby, or that the health of the neighbors will be injured. And that no person shall, by reason of such leave, draw the water from the mill-pond of another, existing at the time of the leave, or otherwise do anything injurious to a vested right in any water-works then existing on the watercourse.

By virtue of the leave thus granted to erect a mill or manufactory on a watercourse in this state, the owner acquires a vested right which cannot be lawfully infringed by any other person or corporation, or taken or applied to public use without just compensation being previously made.

By virtue of this statutory proceeding, one constructing a dam, or intending to do so, may apply to the county court and obtain permission to do so by paying to the riparian proprietors below and above the dam such damages as they may likely sustain by reason of its construction, and this is a full protection to the applicant; but if no application is made to the county court, he still has the right to use his own land, and the water flowing over it, when not injuring others, as there is no restriction to be found in the statute, or elsewhere, by which the owner of the land where the stream runs is prohibited from building a dam when not interfering with the rights of others, but in doing so, if he so obstructs the natural flow of the water as to lessen the supply of his neighbor below, or to overflow his land above, he must answer in damages. The owner is entitled to the reasonable use of the water for natural and domestic purposes; but when he undertakes to divert the course of the stream, or detain the water by means of a dam, so as to prevent the previous supply to other riparian owners, he becomes a wrong-doer. In this case the owner of the mill below has protected himself against any claim for damages, by reason of the extraordinary use of the

water, by his application to the county court; but if he had obtained no such leave, and the running of his mill obstructed the passage of the water and diminished its flow to the injury of those below, he would have been liable for the injury. So in this case, although the railroad company owns the land, if the construction of its dam and the use of the water diminished the flow to appellant's mill so as to affect the running of his mill, it must be regarded as an unreasonable use of the water, because the use of the water for the purpose of supplying the boilers on trains running on the road is something more than the ordinary use for domestic purposes. The use and detention of the water on a large stream by means of a dam, for the purposes of the railroad, might not be an unreasonable use, as ordinarily there would be ample water left for all the purposes of the riparian owners below; yet, where the stream is small, or even large, if the dam so obstructs the water as to diminish the flow and lessen the capacity of the water-power below, it is an injury to the proprietor, for which damages may be awarded. The question, therefore, in this case, is not whether the railroad company made an unreasonable use of the water, but whether its use for the purposes of the railroad injured the mill below. Where the water is detained by dams so as to run mills or supply locomotives, it is not an ordinary use of the water; and while the company may not use more than is reasonably necessary for running its trains, nevertheless, if it injures the mill of the plaintiff, he is entitled to recover.

The instruction that the company had the right to its reasonable use was therefore misleading. The mere detention of the water, or the construction of the dam, is not of itself the injury. It must be such a detention as impedes, delays, or affects the running of plaintiff's mill.

If the use by the railroad causes no material injury to the owner, then no recovery can be had, and this is a question of fact for the jury to determine.

The judgment below is therefore reversed, and remanded for a new trial in conformity with this opinion.

RIPARIAN PROPRIETORS HAVE THE RIGHT, AT COMMON LAW, TO REASONABLE USE of waters of stream running through their respective lands for the purpose of irrigation: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788, and compare cases collected in note 797.

BY COLORADO CONSTITUTION, TITLE TO UNAPPROPRIATED WATERS of the state is vested in the public, with a perpetual right to its use in the people: *Wheeler v. Northern Colorado Irrigation Co.*, 10 Col. 582; 3 Am. St. Rep. 608. and see note 615.

JOHNSON v. COMMONWEALTH.

[86 KENTUCKY, 122.]

JURISDICTION. — **BIGAMY IS COMMITTED** by the act of marrying one woman while the wife by a former marriage is still alive, and the first contract of marriage is still in force; and in Kentucky the act must transpire in that state in order to be subject to indictment and punishment by its courts.

C. W. Lester, for the appellant.

P. W. Hardin, attorney-general, for the appellee.

LEWIS, J. The offense of which appellant has been convicted is bigamy, alleged in the indictment to have been committed July 31, 1886, by becoming married in the state of Tennessee, having previously married another in this state, who was at the time and still is alive, and the marriage with whom had never been annulled or adjudged to be void.

The offense of bigamy is committed by the act of marrying one woman while the wife by a former marriage is still alive, and the first contract of marriage is still in force. That act, as stated in the indictment, was committed in the state of Tennessee, and to try and punish for it the courts thereof alone, at the common law, have jurisdiction: 1 Hawk. P. C. 686, 687.

In some of the states, it is by statute made punishable for a person who, being married, shall marry another person, the former husband or wife then living, or continue to cohabit with such second husband or wife without regard to the state or country where such second marriage may have been contracted. But in this state the legislature has never enacted such statute, and consequently the offense consists alone of the second marriage, and like any other criminal act, must transpire here in order to be subject to indictment and punishment by the courts of this state.

It seems to us the lower court erred in overruling the demurrer to the indictment, and the judgment of conviction must be reversed, and cause remanded.

BIGAMY, MARRIAGE SUFFICIENT TO SUPPORT INDICTMENT FOR: *Hayes v. People*, 25 N. Y. 390; 82 Am. Dec. 364; *People v. Lambert*, 5 Mich. 349; 72 Am. Dec. 49; proof of actual first marriage essential: *Green v. State*, 21 Fla. 403; 58 Am. Rep. 670; first marriage, how proved: *State v. Hughes*, 35 Kan. 626; 57 Am. Rep. 195; *Parker v. State*, 77 Ala. 47; 54 Am. Rep. 43; *Dumas v. State*, 14 Tex. App. 464; 46 Am. Rep. 241; *Holbrook v. State*, 34 Ark. 511; 36 Am. Rep. 17; *People v. Feilen*, 58 Cal. 218; 41 Am. Rep. 258; *Commonwealth v. Jackson*, 11 Bush, 679; 21 Am. Rep. 225; *State v. Johnson*, 12 Minn.

476; 93 Am. Dec. 241; former marriage in another state, how proved: *Williams v. State*, 54 Ala. 131; 25 Am. Rep. 665; *People v. Lambert*, 5 Mich. 349; 72 Am. Dec. 49. One who remarries, knowing his first wife to be living, or not having a reasonable belief of her death, is guilty of bigamy, without further proof of intent: *Dotson v. State*, 62 Ala. 141; 34 Am. Rep. 2.

MANNING v. ANCIENT ORDER OF UNITED WORKMEN.

[88 KENTUCKY, 136.]

INSURANCE.—MUTUAL BENEFIT ASSOCIATION MAY WAIVE FORMALITIES REQUIRED BY ITS CHARTER TO BE COMPLIED WITH IN CHANGING BENEFICIARY, and pay the benefit to the new beneficiary, although the new direction as to its payment was not made by the assured in the mode pointed out by the organic law of the association, and notwithstanding it is a rule of the law of insurance that when a policy is issued, the right to the benefit at once vests in the beneficiary, and the assured has no power subsequently over the insurance.

Richards and Hines, and Guy C. Sibley, for the appellant.

B. F. Camp, for the appellee.

HOLT, J. The appellee, the Ancient Order of United Workmen, issued to Robert K. Manning, through its supreme lodge, on January 13, 1879, a certificate of membership as a master workman, entitling him to an interest in its beneficiary fund to the extent of two thousand dollars, it, by the terms of the certificate, to be paid at his death to his brother, the appellant, Delly J. Manning.

By the regulations of the order, this insurance was obtained through the subordinate lodge. The certificate was sent to it for the insured, but for some reason not disclosed by the record, he left it in its charge. He was then unmarried, but remained so but a short time, and before June 5, 1879, united his fortune in life with that of Josie A. Brown. At the date last named, and when living distant from his subordinate lodge, he wrote to one of its officers, known as its financier, as follows:—

“Please find inclosed my dues of Lodge No. 2, A. O. U. W., three dollars, and in return please send my policy made out to Mrs. Josie A. Manning, and oblige, very respectfully, etc.,

“R. K. MANNING.”

He was killed on July 25, 1879.

The law of the order provides: “Any member holding a beneficiary certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing, on the back of his certificate, in the form

prescribed (see form No. 6), attested by the recorder, with the seal of the lodge attached, and by the payment to the supreme or grand lodge of the sum of fifty cents; but no change of direction shall be valid, or have any binding force or effect, until said change shall have been reported to the supreme or grand recorder, the old certificate, if practicable, filed with him, and a new beneficiary certificate issued thereon; and the said new beneficiary certificate shall be numbered the same as the old certificate."

The above quoted letter was referred by the financier of the lodge to its recorder; and the fee of fifty cents above named not having been forwarded by the insured with the direction to change the beneficiary in his policy, the last-named officer wrote to him, requesting him to furnish it. His death probably prevented his doing so. In any event, it was not done, and nothing further appears to have been done in the matter prior to Manning's death. After it occurred, the recorder of the subordinate lodge certified the letter to the grand lodge of the state of Kansas, it then having power to issue beneficiary certificates, with an indorsement of its genuineness; and it issued a new certificate payable to Josie A. Manning. It is dated July 10, 1879, and countersigned July 12, 1879, but in fact it was not issued until after Manning's death, and on September 16, 1879. Shortly afterward, the benefit was paid to the widow. The appellee now sues for the fund, claiming that it was paid to the widow without authority, and that in point of fact no change in the beneficiary was ever made.

It is shown that the appellee paid the insurance to the widow shortly after the issual of the new certificate. It evidently did so in good faith, and without any notice of any claim to it by the appellant.

It is evident that the prime object of the beneficiary feature of the order is to aid the family of the assured. The claim of the widow should not, therefore, be viewed with disfavor. He may, however, direct the benefit to be paid to any person whom he may name.

The appellee's charter says: "Such beneficiary fund as the corporation may deem suitable and proper may be set apart and provided to be paid over to the families of deceased members, or to such persons as such deceased members may, while living, direct."

It is a rule of the law of insurance, that when a policy is issued, the right to the benefit at once vests in the beneficiary.

The person procuring the insurance has subsequently no power over it. The policy and the money to be paid upon it belong, the moment it is issued, to the person named in it as the beneficiary. This rule, in the absence of anything in their charters, applies to mutual benefit associations like the appellee: *Weisert v. Muehl*, 81 Ky. 336.

The organic law of the appellee, however, allows the assured to change the direction of the benefit. The only question presented therefore is, whether the letter *supra* so operated.

The appellant had but a contingent right to the benefit,—not a vested and absolute one. It was subject to be defeated at the will of the assured. The law of the order, above cited, provides how this shall be done. The regulation is a reasonable one, but the question arises, whether it shall govern as between claimants to the benefit, if the order has seen fit to waive it. We think not. Its object, beyond doubt, was to prevent the appellee from becoming involved in litigation with outside claimants. Upon this idea it was held in the case of *National Mutual Aid Society v. Lupold*, 101 Pa. St. 111, where the certificate provided: "This certificate may be assigned and transferred only by and with the consent of the association indorsed thereon," and it was done without such approval, that it was a part of the contract, and the society had a right to insist upon the protection which it was intended to afford.

The direction by the insured to change the benefit was, in the case now under consideration, given through the proper channel. The subordinate lodge referred it to the proper authority, and it saw fit to waive the regulations intended for its benefit, and comply with the direction, although made in an informal manner, and without the payment of the fee. The intention of the assured was to change the benefit. He so directed in writing; and now, because he did not do so in the formal manner prescribed by the law for the benefit of the order, it is asked by a third party, whose interest in the insurance was liable to end at any time at the will of the assured, that his intention shall be defeated, although the party for whose benefit the form was prescribed has seen proper to waive it. Such a rule would sacrifice substantial justice to mere form. It would tend to defeat the benevolent aim and purpose of the organization, and the desire and intention of the assured.

Members of the order may be remote from their lodge; they

may not have their certificates with them, and therefore be unable to make the indorsement thereon as directed, or to have it attested by the recorder of their lodge, or its seal attached thereto. If the appellee chooses to waive these formalities, it does not lie in the mouth of a third party to complain. The order is entitled to know who is entitled to the benefit fund; and the formal mode of changing its direction is for its benefit; while, upon the other hand, the right of the beneficiary rests in the mere will of the assured.

It has been repeatedly held that a transfer of the stock of a corporation is valid as to the parties to the transfer, although not made upon the books of the corporation as required by its charter or by-laws, provided it be done in any mode known to the law for the transfer of like personal property.

In our opinion the letter of June 5, 1879, operated to change the direction of the benefit, inasmuch as the appellee saw fit to waive its informality; and as the assured had therefore done all that was needed on his part, the fact that the appellee issued the new certificate after his death does not affect the right of the parties.

If the appellee were in court with the fund asking that the conflicting rights of claimants to it be determined, and was silent as to the informality of the direction to change the benefit, it seems to us that the widow ought to prevail.

Judgment affirmed.

LIFE INSURANCE, waiver of forfeitures provided for in policies: *Continental Life Ins. Co. v. Yang*, 113 Ind. 159; 3 Am. St. Rep. 630, note 637. Change of beneficiary: *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156; 58 Am. Rep. 806.

POLICY OF INSURANCE ON LIFE OF ANOTHER, TAKEN BY ONE WHO HAD INSURABLE INTEREST IN IT, for the purpose of assigning it to a third person who had no such insurable interest, is void, as a wagering policy in the hands of the assignee: *Keystone Mut. Benefit Ass'n v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572.

AM. ST. REP., VOL. IX. — 13

SUTTON v. HEAD.

[86 KENTUCKY, 153.]

CONTRACTS IN RESTRAINT OF TRADE—USE AND OCCUPATION OF LAND.—

Limitation is reasonable, and will be enforced, which provides that "no intoxicating liquors are to be sold on said premises in less quantities than five gallons," and is inserted in a deed of land because the vendor's store and dwelling-house were near by.

RESTRAINT OF TRADE.—INJUNCTION is proper remedy against willful violation of restriction in deed not to sell on the premises conveyed spirituous liquors in a less quantity than five gallons.

PAROL EVIDENCE THAT LIMITATION AS TO USE OF LAND ENTERED INTO THE CONSIDERATION OF A DEED thereof is admissible, although deed may be silent as to it.

RESTRICTION IN A DEED AS TO SALE OF LIQUORS ON THE PREMISES CONVEYED IS A COVENANT running with the land, and therefore effective against a tenant or assignee of the vendee.

J. C. Wickliffe, for the appellant.

C. T. Atkinson, for the appellee.

HOLT, J. In 1875, the appellee, F. M. Head, for the recited consideration of fifty dollars, conveyed to the appellant Henry Sutton a small lot in the town of New Hope. The deed contained this clause: "No intoxicating liquors are to be sold on said premises in less quantities than five gallons." It was inserted because the vendor's store and dwelling-house were near by, and the lot had been conveyed to him with a like restriction as to its use.

The appellant Sutton built a house on it, which was used for various purposes for several years, and until a short time before this suit was brought, when he rented it to the appellant Blair for saloon purposes. The latter began selling liquor in it by the small, and shortly after doing so, this action was brought by the appellee against the appellants, enjoining such use.

If the restriction is valid, then the remedy by injunction is proper, because it avoids multiplicity of action, and affords adequate relief. Not only is the limitation upon the use set forth in the deed, but it is shown that it entered into the consideration for the contract. This could have been shown by parol, even if the deed were silent as to it: *Pierce v. Woodward*, 6 Pick. 206.

It was one of the most ancient rules of the common law that all contracts in restraint of trade were void. We learn from the year-books that this was considered as settled law in

England as early as the year 1415; and its courts would not then tolerate the least infraction of this rule. It was enforced with much judicial severity, and doubtless grew out of the law of apprenticeship under which no one in that country could earn a livelihood at any trade until after long service, and then he must continue in the one adopted by him, or have none.

For two hundred years the rule existed, without exception, that all contracts in restraint of trade were void. It was qualified, however, as the law of apprenticeship broadened; and a distinction was then drawn by the cases of *Broad v. Jollyfe*, Cro. Jac. 596, and *Mitchel v. Reynolds*, 1 P. Wms. 181, between a general and a limited restraint of trade.

Other decisions followed until it became the settled English rule that while a contract not to do business anywhere is void, yet one stipulation not to do so in a particular place, or within certain limits, is valid. This has always been the rule in this country. The wisdom of the rule as qualified cannot be doubted. It is eminently suited to the genius of our institutions. It prevents the building up of monopolies and the creation of exclusive privileges.

Contracts in general restraint of trade produce them; they tend to destroy industry and competition in a country, thus enhancing prices and diminishing the products of skill and energy; they impair the means of livelihood, and injure the public by depriving it of the services of men in useful employments. The law, therefore, guards against these evils by declaring such contracts void: *Pike v. Thomas*, 4 Bibb, 486; 7 Am. Dec. 741.

This reasoning, however, does not apply to such as impose but a special restraint, as not to carry on trade at a particular place, or with certain persons, or for a limited reasonable time. The party contracting is then left free to exercise his trade or transact business at other places, other times, and with other persons. Indeed, a particular trade may be promoted by being limited for a short period to a few persons, and the public benefited by preventing too many from engaging in the same calling at the same place.

If, therefore, the limitation be a reasonable one, it will be upheld: *Grundy v. Edwards*, 7 J. J. Marsh. 368; 23 Am. Dec. 409; *Turner v. Johnson*, 7 Dana, 435.

The one now under consideration is so; it related to the use and occupation of the property; it was a covenant running with the land. and therefore effective against a tenant or

assignee of the vendee; and the appellants were, when enjoined, engaged in the willful violation of it: *Stephen's Nisi Prius*, 1113. Judgment affirmed.

RESTRICTION THAT LAND SHALL NOT BE USED FOR MANUFACTURING, "of any nauseous or offensive business," is not contrary to public policy, nor in unreasonable restraint of trade: *Whitney v. Union R. R. Co.*, 11 Gray, 359; 71 Am. Dec. 715; and see *Trustees v. Lynch*, 70 N. Y. 440; 26 Am. Rep. 615. But compare *Trustees v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365; *West Va. Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; 46 Am. Rep. 527.

CONDITION IN DEED AGAINST SELLING SPIRITUOUS LIQUORS is valid, although such sales are not illegal: *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391.

WHERE GRANTEE BINDS HIMSELF BY COVENANT IN HIS DEED LIMITING the use of the land purchased in a particular manner so as not to interfere with the trade or business of the grantor, and the covenant is valid as between the parties, it is also binding upon and may be enforced against a grantee of the covenantor taking title with notice of the restriction, and this, although the assignees of the covenantor are not mentioned or referred to. It is not necessary that the covenant should be one technically running with the land, it being sufficient that the purchaser has notice of it: *Hodge v. Sloan*, 107 N. Y. 244.

DOUGLAS v. PEOPLE'S BANK OF KENTUCKY.

[86 KENTUCKY, 176.]

BILL OF LADING DOES NOT POSSESS THE CHARACTERISTICS OF BILLS OF EXCHANGE, or other negotiable instruments placed upon the footing of bills of exchange. A bill of lading does not represent money, but property; it is only negotiable in the sense that its true owner may transfer it by indorsement or assignment so as to vest the legal title in the indorsee.

OWNER OF BILL OF LADING MAY PLEDGE IT AS COLLATERAL SECURITY for a debt; and possession of property in transit may be effected by transferring the bill of lading, such transfer being regarded as equivalent to investing the pledgee with actual possession. The title, however, is not thereby vested in the pledgee; but he acquires a lien thereon, which, as long as he retains possession, either actual or symbolical, is a legal lien, and will prevail against any prior equities existing on behalf of third parties, of which he had no notice, or of which he was not legally required to take notice.

ESTOPPEL. — CARRIER OF PROPERTY, WHICH, BY THE TERMS OF THE BILLS OF LADING, IS DELIVERABLE TO THE SHIPPER'S ORDER, IS LIABLE for its value to the true owner if he delivers the property to the consignee, or any one else, without such order; but where the pledgor of the bills of lading has been permitted by the pledgee to present them to the carrier as his own, and so obtain the property, the pledgee is estopped to gainsay what he has thus sanctioned.

Ramsey, Maxwell, and Matthews, and Charles H. Gibson, for the appellant.

William Lindsay and E. E. McKay, for the appellee.

BENNETT, J. The appellee brought suit in the Louisville chancery court against the appellant and the firm of Moise, Barbour, & Co., partners in the grain business in the city of Louisville. The appellee sought by the suit to recover judgment against the firm of Moise, Barbour, & Co. on a note for five thousand dollars, which the firm executed to the appellee. The appellee also sought to recover judgment against the appellant for the value of corn and rye, the title to which was evidenced by six bills of lading, executed by the appellant as a common carrier, by which the appellant undertook to deliver to the firm of Moise, Barbour, & Co., in the city of Louisville, the grain mentioned in the bills of lading. Each bill of lading shows that the grain therein mentioned was shipped to the order of the shipper, per advice of Moise, Barbour, & Co., and each bill of lading was indorsed by the shipper, and that the firm of Moise, Barbour, & Co. was the owner of each of them. It was alleged by the appellee that Moise, Barbour, & Co., while they were the owners of these bills of lading, transferred and delivered them to it in pledge as collateral security to the above-named note; and that the note was due and unpaid; and that the appellant refused to deliver the grain to the appellee. The appellee, upon the foregoing allegations, asserted its lien upon the grain, and sought judgment against the appellant for its value. The appellant put in issue the allegations of the appellee in reference to these matters, and a trial of the case resulted in a judgment against the appellant for the value of the grain. This appeal is prosecuted from that judgment.

A bill of lading does not possess the characteristics of bills of exchange or other negotiable instruments placed upon the footing of bills of exchange. The peculiar characteristics of these instruments rest either upon statute or commercial usage, sanctioned by express decision. A bill of lading has neither of these foundations to rest upon. It does not represent money, but property. No one ever supposed that a written obligation to pay so much in property, or to deliver such and such property, possessed the characteristics of negotiability in the sense of a bill of exchange, or other instrument placed upon the footing of a bill of exchange.

Such instruments represent money in commercial usage, and the innocent holder for value in the usual course of trade is protected against all equities of the antecedent parties. Nor is such innocent holder's right affected by any infirmity in such instruments. They are protected in some cases against the claim of the rightful owner; whereas the indorsee or assignee of a bill of lading, which is made to the order of the shipper, must trace his title back to its true owner. He has no greater right than the true owner.

When it is said that such a bill of lading is negotiable, it is only meant that its true owner may transfer it by indorsement or assignment so as to vest the legal title in the indorsee: See *Pollard v. Vinton*, 105 U. S. 7.

A sale and delivery of personal property by the owner perfects the title in the vendee. He thereby acquires a right to the property which is superior to antecedent equities and liens of which he had no actual notice, or such notice as the law requires him to take cognizance of.

Both a contract of sale and delivery of personal property are necessary to the completion of title in the vendee. He thereby acquires a right to the property which is superior to antecedent equities, liens, or executory sales, as between the vendor and third persons, of which he had, at the time of his purchase, no actual notice, or such notice as the law requires him to take cognizance of. And where the property is in transit by the carrier, the owner may deliver it to the purchaser symbolically. This may be done by the owner's indorsement of the bill of lading to the purchaser.

It is said in *Newsom v. Thornton*, 6 East, 41, that "a bill of lading will pass the property upon a *bona fide* indorsement and delivery, when it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. But it cannot go further." In *Hatfield v. Phillips*, 9 Mees. & W. 648, it is said: "As soon as the goods are landed and warehoused in the name of the holder, that holder then becomes possessed of the goods themselves in the eye of the law, and derives his power, not from the bill of lading, but from such possession." But while the cargo is still at sea, or the transit continues in any other form, the bill of lading stands for and represents the goods themselves, and will therefore enable the assignee to do as much, but no more, than he could have done if they had actually arrived and come to his possession. In *Meyerstein v. Barber*, L. R. 2 Com. P.

38, 45, it is said: "The bill of lading represents them [the goods], and the indorsement and delivery of the bill of lading operate exactly the same as a delivery of the goods themselves to the assignee, after the ship's arrival, would do."

So the assignment of a bill of lading for value, while the goods are in transit, is limited to the effect of symbolizing their sale and delivery, and the assignee is thereby invested with all the rights of a purchaser with actual delivery of possession, but no more. It is also well settled that the owner of a bill of lading may pledge the same as collateral security for a debt; and as it is indispensable to the validity of a pledge that the actual possession of the property pledged should pass to the pledgee, the possession of the property which is sought to be pledged while it is in transit may be effected by transferring the bill of lading. Such transfer of the bill of lading is regarded as equivalent to investing the pledgee with the actual possession of the property. Such pledge does not invest the pledgee with title to the property; the title remains in the pledgor; but the pledgee acquires a lien upon the property for the security of his debt; and this lien, as long as he retains the possession of the property, either actual or symbolical, is a legal lien, which is paramount to, and will therefore prevail against, any prior equities existing on behalf of third parties, of which the pledgee had no notice, or of which he was not required by law to take notice: *Petitt & Co. v. First National Bank of Memphis*, 4 Bush, 338.

As before stated, the grain mentioned in the six bills of lading in controversy was made, by the terms of the bills of lading, deliverable to the shipper's order. Therefore, the title to the grain did not pass to the consignees, Moise, Barbour, & Co., but remained in the shipper; and he could only pass his title to the grain to the consignees by an indorsement of the bills of lading. And the appellant, the railroad company, had not the right to deliver the grain to the consignees, or any one else, except upon the order of the shipper. The shipper reserved to himself the right of property in the grain, and the railroad company undertook to transport it as his property, and to deliver it only upon his order. And it was the contract duty of the railroad company so to do; and if the company delivered the grain to Moise, Barbour, & Co. without their being the owners of it,—which fact should be established by the exhibition of the bills showing that they were the owners of them by the indorsement of the shipper,—the company

thereby rendered itself liable to the true owner of the grain for its value: 2 Daniel on Negotiable Instruments, sec. 1740; Hutchinson on Carriers, secs. 180, 183.

The appellant, the railroad company, delivered the grain to Moise, Barbour, & Co.; and there is no doubt that, at the time of the delivery, they were the owners of the grain which the bills of lading represented. The appellee concedes this fact, but it contends that, at the time of the delivery, it was in the actual possession of the bills of lading, and was the owner of them as pledgee for the security of Moise, Barbour, & Co.'s indebtedness to it, whereby it had a lien on the grain itself to secure said indebtedness.

If it be true that, at the time the railroad company delivered the grain to Moise, Barbour, & Co., the appellee held the actual possession of these bills of lading in pledge for the security of their indebtedness to it, and the railroad company delivered the grain to Moise, Barbour, & Co. notwithstanding that fact, and without requiring them to show, by the production of the bills of lading, that they were the owners of the grain, they are, in that case, liable to the appellee for its value. On the other hand, if the grain was delivered to Moise, Barbour, & Co. by their exhibiting the bills of lading to the railroad company, which showed that they were the owners of them, and entitled to them, and that Moise, Barbour, & Co. were enabled, by the conduct of the appellee, to thus exhibit said bills as their own, for the purpose of obtaining the delivery of the grain to themselves, and whereby they did obtain its delivery to themselves, then the appellee should not be allowed to recover the value of the grain from the appellant.

The railroad company's cashier swears that the company's place of switching its freight trains was in Jeffersonville, where the freight remained until orders were received where to deliver it; that the bills of lading were presented by Moise, Barbour, & Co. at the window of the cashier's office, and the numbers of the cars transcribed from the bills of lading to the books of the company, and the cars ordered over to Louisville, and the grain there delivered. While the cashier swears that he could not remember that these indential bills were presented at the cashier's office by Moise, Barbour, & Co., yet he is positive that they were so presented, properly indorsed, for the reason that all bills of lading, made to order of the shipper, were required to be exhibited, properly indorsed, before the company would deliver the grain; and that a mem-

orandum of each car containing the grain was taken directly from each bill of lading, from which memorandum the car was ordered over to Louisville. And while unable to recall to memory the particular bills of lading in controversy, he remembers that no grain was delivered to Moise, Barbour, & Co. on bills of lading requiring the grain to be delivered to the order of the shipper, unless they presented the bills properly indorsed. The chancellor was of the opinion that the cashier of the company was mistaken as to those particular bills of lading having been presented by Moise, Barbour, & Co. We think the evidence in the case fails to show a different state of case. The cashier's evidence is strong, consistent, and direct, and is circumstantially corroborated by the evidence of the appellee's cashier. He swears that it was the agreement between the appellee and Moise, Barbour, & Co. that the latter might withdraw the bills of lading deposited from time to time by depositing other bills of lading of equal value in their place. The object of allowing the withdrawals and substitutions was to enable Moise, Barbour, & Co. to receive the freight on the bills of lading withdrawn. He also swears that not only Moise, Barbour, & Co., but their clerk, came to the bank whenever it suited them, took the bills of lading in hand, and made such withdrawals and substitutions as they saw proper, without the supervision of any of the bank officers, and without their knowledge of what bills of lading were withdrawn, or what left in their place, if any. So we have no proof that these bills of lading were in the actual possession of the appellee at the respective times the grain was delivered, but we have proof that Moise, Barbour, & Co. had the appellee's authority to withdraw these bills of lading for the purpose of receiving the freight that they represented. We also have proof that they and their clerk handled the bills of lading at pleasure, and made such changes as they pleased. It also appears that they had the opportunity, furnished by the appellee, to withdraw these bills for the purpose of receiving the freight thereon, and then return them.

With these facts before us, we find nothing in the record that directly, or by necessary implication, contradicts the evidence of the company's cashier. While it may be admitted that the railroad company was not punctiliously exact in its dealings with Moise, Barbour, & Co. as to the delivery of the grain, yet it may be regarded as an established fact that the bills of lading properly indorsed were presented to the company by Moise, Barbour, & Co., who were in fact the legal

owners of the grain which the bills represented, but subject to the appellee's lien; and that the grain was delivered to them on the faith of the presentation of the bills of lading properly indorsed, and the apparent ownership in Moise, Barbour, & Co., and that the bills of lading were presented and the grain delivered by the conduct and authority of the appellee. Therefore, the proposition to allow the appellee to recover the value of the grain from the appellant, under these circumstances, contains no element of fair dealing, no equity, no legal right.

The appellee is estopped to gainsay and undo what was authorized and sanctioned by its conduct.

The judgment of the lower court is reversed, and the case is remanded, with directions to dismiss the appellee's petition.

BILLS OF LADING, CONSTRUCTION AND EFFECT OF: *Chandler v. Sprague*, 5 Met. 306; 38 Am. Dec. 404, and note 407-426; as transfer of title: *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290, and note 299-301; *First Nat. Bank v. Ege*, 109 N. Y. 120; 4 Am. St. Rep. 431, and note 435; conclusiveness of, as evidence of contract to carry: *McFadden v. Missouri Pac. R. R. Co.*, 92 Mo. 343; 1 Am. St. Rep. 721, and note 729.

FAIR AND HONEST ACCEPTANCE OF BILL OF LADING, WITHOUT DISSENT, raises a presumption that all limitations contained therein were brought to the shipper's knowledge, and agreed to by him: *Merchants' Dispatch Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847.

BILL OF LADING IS NOT TO BE REGARDED AS CONTRACT IN WRITING, but as an admission on the part of the consignor as to his purpose at the time of making the shipment, and such admission is subject to rebuttal: *McBee v. Crasar*, 15 Or. 62.

METCALFE v. BRAND.

[86 KENTUCKY, 331.]

TRADE-MARK MAY CONSIST OF a name or device, or a peculiar arrangement of words, lines, or figures, or any peculiar mark or symbol, not theretofore in use, adopted and used by a manufacturer or a merchant for whom goods may be manufactured, or to designate them as those which he manufactures or sells. It may be put either upon the article itself or its case, covering, or wrapper, and is assignable with the business. The term cannot be properly applied to a label; it may, however, contain one. Mere words may not be used as a trade-mark, except they indicate origin, ownership, or the maker.

IF A GEOGRAPHICAL NAME BE USED AS SUCH, IT CANNOT BE PROTECTED AS A TRADE-MARK, but as to a manufactured article, although the name of the place where it is made serves in no possible way to indicate its quality or composition, yet where the manufacturer has given it a geographical name, which he was the first to use in connection with the article, it may, from long use in such connection, acquire a secondary meaning, and instead of designating the place where the article is made, indicate its origin, or that it is the product of a particular manufacturer, or made according to his method. When this is the case, it becomes a

valid trade-mark. A distinction should be made between the use of a geographical name indicating a particular manufacture of a certain person, and its use in describing a natural product of a particular locality.

INJUNCTION. — A PERSON IS ENTITLED TO BE PROTECTED IN THE USE OF A PARTICULAR LABEL OR WRAPPER as much as in the use of a trade-mark. One may not use the label of another or a colorable imitation. The simulation need not be exact; the copy may be made with slight changes even. If it be substantially imitated, and so essentially alike that persons of ordinary observation and the unsuspecting public are likely to be deceived, it is sufficient to authorize equitable intervention by injunction.

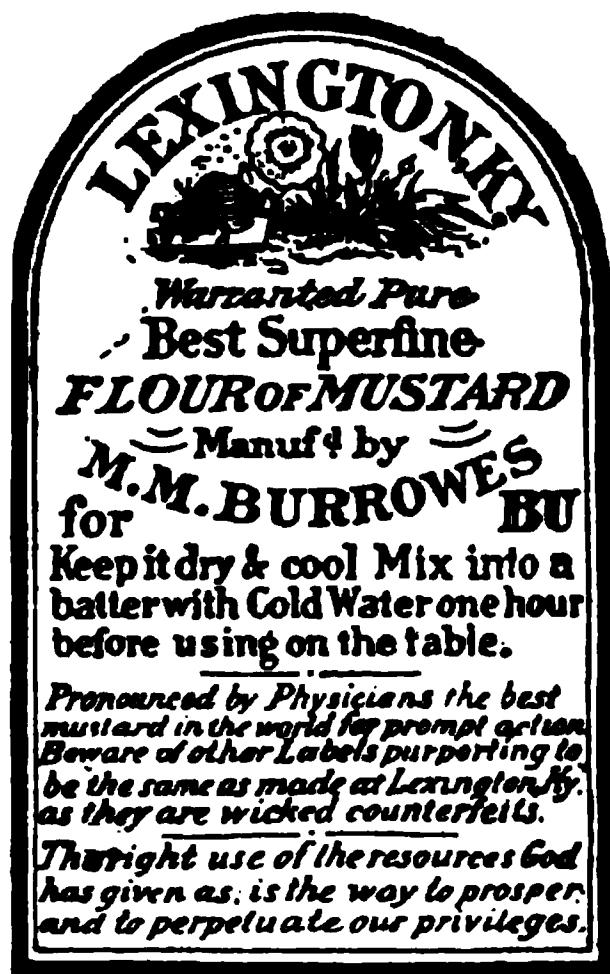
PLEADING. — DEFECT OF PARTIES SHOWN BY THE PETITION AND NOT DEMURRED TO IS WAIVED under section 92 of the Kentucky Civil Code.

R. W. Woolley and Z. Gibbons, for the appellant.

Simrall and Bodley, and Beattie and Winchester, for the appellee.

HOLT, J. This case presents some interesting and rather novel trade-mark questions.

As early as 1810, one Burrowes began to make, by a secret process, a particular kind of mustard, at Lexington, Kentucky. It soon became noted for its excellence, and widely known as "Burrowes' Lexington Mustard," or more commonly as "Lexington Mustard." By this name it was quoted in the market, and soon had an extensive sale at a high price. It was put up in round tin cans of different sizes, with a label upon each, of this character, in size, color, letters, words, and other *indicia*:—



Burrowes continued to manufacture and put it upon the market in this form, and thus labeled, for nearly or perhaps

quite thirty years; and until his death, or near it, in or near 1841, when his wife succeeded to the business, and carried it on in the same way for several years, and until it was transferred to her son, Samuel D. McCullough. He appears at first to have continued the use of the same label; but subsequently used a different one, of the following character, and in which the word "Lexington" is similarly used, save as to place: —

He continued the business until 1869, when he sold out to the firm of Yates and Dudley; and they carried it on until July, 1877, when they transferred it to the appellee, J. H. Brand.

While conducted by them, they used upon their packages this label: —

They also used another label, different in color and other respects, upon which were these words *inter alia*: "Burrowes' Celebrated Lexington Mustard. Manufactured by Yates and Dudley, Lexington, Ky." They advertised it as "Burrowes' Lexington, Ky., Mustard," and appear to have branded some of their cans, "Burrowes' Lexington Mustard."

Their contract of sale with the appellee, Brand, dated July 12, 1877, speaks of it as "Burrowes' Lexington, Ky., Mustard."

It had been manufactured during all this time in the same building probably, and certainly in the same locality; and Brand continued to so make it from about the 1st of August, 1877, until September following, when he associated one Osborne with him, and removed the business to Louisville, Kentucky, where it was conducted under the firm name of John H. Brand & Co. They used two labels upon their cans or packages, the following being that known as their blue label, and which was used upon the round cans:—

The ground color of the other was yellow, with various devices and words upon it, among them being "Burrowes' Celebrated Lexington Mustard"; and it was used upon the square cans. They subsequently also used the following label, which, as will be seen, is almost identical with that used by Burrowes:—



And also by printed placards advertised their manufacture as "Burrowes' Lexington Mustard." So far as shown, however, all of the labels and advertisements used after the removal to Louisville showed upon their face that the firm was located there.

The tin cans used in putting up the mustard were round, with flat tops, around which were pasted, in order to more securely fasten them, strips of light red or brownish cotton cloth.

The appellant, Metcalfe, began to make mustard at Lexington about 1873, and has so continued ever since. Some two or three years before Yates and Dudley sold out, he used a blue label, but upon his square cans only, and it was, according to his own testimony, quite different and easily distinguishable from the blue one used by them, and that subsequently used by the appellee, Brand. It is not exhibited in the record; but Metcalfe testifies, without contradiction, that it contained the words, "H. C. Metcalfe's Improved Lexington, Kentucky, Mustard." In November, 1877, he for the first time began to use upon his round tin cans, corresponding in size and shape with those then in use by the appellee, Brand, both the following label and a strip of cloth similar in all respects to that then employed by Brand:—

He also, in December, 1878, moved his manufactory into the same building where the Burrowes mustard had formerly been made.

The lower court held that the appellee, Brand, had an exclusive right to use the words "Burrowes' Lexington Mustard"; that the appellant, Metcalfe, had the right to use the words "H. C. Metcalfe's Lexington, Kentucky, Mustard"; but that his package, with the strip of light red cloth around its

top, and the blue label upon it, was an illegal imitation of Brand's package, and he was enjoined from using it, and from packing, labeling, or marking his mustard with any colorable imitation of Brand's blue label, and also from using the words of caution on his (Metcalf's) label, from the end of the first line, and after the word "be," to the word "made," on the third line. He now, by this appeal, complains of this injunction.

The court below declined to decide whether Metcalfe could use the words "Lexington Mustard," or "Lexington, Kentucky, Mustard," without being preceded by his name; but decided that he might use the round tin can, or cotton strips to bind the top, or a paper label, provided they were not so combined as to colorably imitate Brand's package. The appellee, Brand, by a cross-appeal, also complains, insisting that he has an exclusive right to the use of the word "Lexington" as a trade-mark in connection with the word "Mustard," and its manufacture. These complaints, therefore, present two questions: 1. Has the appellee, Brand, an exclusive right to the use of the word "Lexington" as the name, or part of the name, of his mustard? 2. Has the appellant, Metcalfe, wrongfully and so far imitated, by label or otherwise, the article manufactured and offered for sale to the public by Brand as to authorize equitable interference?

The law as to trade-marks is by no means ancient. It is one of the results of multiplied invention and modern commercial growth. Especially is the doctrine of equitable intervention for their protection of recent origin. The right to sue for their improper use doubtless arose originally from the common-law right to maintain an action for a false representation; and as the wrong was calculated to work an injury, not only to the purchaser, but to the maker or manufacturer of the article, a right of action at common law was given to the latter in such a case. Then the common law advanced another step. It was held that although the original purchaser was not deceived, but knew who was the real manufacturer, yet, if the trade-mark was put upon the article in order to deceive a future purchaser, and cause the public to believe that it was the manufacture of the person to whom the trade-mark in fact belonged, then this entitled him to sue, because it was equally a deception. Next, the courts of equity—*æquitas supplet legem*—declared that although a person had honestly purchased goods from one maker with the trade-mark of another upon them, or had manufactured them to order, not knowing

that he was wrongfully putting the trade-mark of another upon them, yet he could not put them upon the market, because it would both injure the true owner of the trade-mark and deceive the public. Thus gradually the law extended its protecting arm until the right of the first user to what is known as a trade-mark was recognized, the underlying principle being, that one person shall not be permitted to sell his goods as those of another, or use the means likely to lead thereto, thus not only injuring such other person, but deceiving the public.

It will aid us in the consideration of this case to first see, under the rule of *stare decisis*, what principles of this branch of the law are to be regarded as settled. It is somewhat difficult to give a concise definition of a trade-mark. It may consist, however, of a name or a device, or a peculiar arrangement of words, lines, or figures, or indeed, any peculiar mark or symbol, not theretofore in use, adopted and used by a manufacturer, or a merchant for whom goods may be manufactured, to designate them as those which he manufactures or sells. It may be put either upon the article itself, or its case, covering, or wrapper, and is assignable with the business. The term cannot be properly applied to a mere label. It, however, may contain one. It may be the vehicle or embodiment of it. The object is to show the origin of the article. The general rule is against the use of mere words as a trade-mark. An exception to this, however, is where they indicate origin, ownership, or the maker. If they are of common use, indicating merely kind or quality,—as, for instance, “superfine,” or “first quality,” or are merely descriptive of the nature of the article, or of a generic character, as “hemp” or “cotton,”—then they cannot be so appropriated: *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270; *Helmbold v. Helmbold Mfg Co.*, 17 Am. Law Reg., N. S., 169; *Manufacturing Co. v. Trainer*, 101 U. S. 51. Such words are the common property of all men. They may be used truthfully by one man, without infringing upon another's right, or creating a possibility of the public being thereby deceived. Thus the word “hemp” is a generic one, embracing the hemp of every man. The mark “A No. 1,” upon a firkin of butter, is a common one, indicating its quality. A trade-mark must be specific. It must mark the goods of the manufacturer as his goods, and not as his in common with all other persons.

Keeping in mind the above rules, which we think will be conceded as now settled, we, in the light of them, proceed to the consideration of a question which is by no means beyond dispute. It is, Can a person, under any circumstances, acquire a trade-mark right in the name of a place when associated with the name of the article manufactured by him? In other words, could the appellee, Brand, acquire an exclusive right to use the word "Lexington" as part of the name of his mustard? It is clear that prior use by him is essential to such a claim: *Manufacturing Co. v. Trainer, supra*. If he had acquired such right, then he could continue to use it after the removal of his manufactory to Louisville, provided he did so without fraud. Equity will not protect a trade-mark that expresses a falsehood as against one which expresses a truth. To do so would sanction a fraud: *Helmbold v. Helmbold Mfg. Co., supra*. It, however, appears that the appellee's packages of mustard, put up after the removal, always located the firm in Louisville.

If a geographical name be used as such, it cannot be protected as a trade-mark. Clearly, all persons living in a town or city may use its name as an address; and of course many persons may make the same article in the same town, and show that it is so manufactured, by having the name of the place stamped upon it, or printed upon the label or covering, as their address or place of business. Otherwise, monopolies, which are destructive of individual right and public interests, would be created and fostered. The right of one person to appropriate the name of a region of country to the exclusion of others who produce or sell a similar product of the same region, may be regarded as settled by the supreme court in *Canal Company v. Clark*, 13 Wall. 311, commonly known as the "Lackawanna Coal Case." Lackawanna is the name of a considerable region of country. Lackawanna coal is a natural product of that region, and the name was descriptive of the general character or quality of the product. It not only indicated the place from whence the coal came, but the general quality of the article. Being generic and thus descriptive, it was held that each of the contestants had a right to call his coal "Lackawanna coal"; but this case cannot be regarded as holding that the name of a place can, under no circumstances, become a trade-mark. The general qualities of a natural product are indicated by the name of the region from whence it comes. All have a right to sell it, and in

doing so, to call it by the name of the section where it is produced, or from whence it originally came, as that in effect describes the article.

Such a name indicates the quality, and not the producer or the ownership. All may use it with equal truth. It is not like a sale of one man's goods as those of another. There is no invasion of a man's business reputation, and no imposition practiced upon the public. For these reasons, such phrases as "Sea Island Cotton," "Hungarian Grass," "Kentucky Hemp," or "Virginia Tobacco," will not be protected as trade-marks. This is not so, however, of a manufactured article. The name of the place where it is made serves in no possible way to indicate its quality or composition; and where the manufacturer has given it a geographical name, which he was the first to use in connection with the article, it seems to us that it may, from long use in such connection, acquire a secondary meaning; and instead of designating the place where the article is made, indicate its origin, or that it is the product of a particular manufacturer, or made according to his method. When this is the case, it becomes, in our opinion, a valid trade-mark. It then designates the particular goods of this one man. The public so understand it; and this is the aim and end of a trade-mark. The name is no longer used to indicate the place where they are made, but becomes the name of his goods. It gives notice that he is the maker. It, by reason of first and continued use, and association with the name of the article made or sold by him, acquires an understood reference to him. It is the trade denomination of his article. It acquires a secondary meaning in connection with a particular manufacture.

Thus we will suppose that John Doe has for years made at Mt. Sterling, Kentucky, a revolving book-case, which he has called during all that time the "Mt. Sterling Revolving Book-case." The materials out of which he constructs it come from different places; no one else has made such a case there, or used this name; and it does not express in any way the quality of the article, save as referring to Doe as the maker. The public, when they ask in the market for the "Mt. Sterling Revolving Book-case," understand that it is the one manufactured by him.

The name "Mt. Sterling," as used in this connection and under such circumstances, indicates the particular book-case of this one man. His skill has given it excellence and reputa-

tion in the market, and justice to him, as well as the protection of the public, require that its name should be protected as a trade-mark. It will create no monopoly. Upon the contrary, it will serve to stimulate invention and competition. It will not hinder Richard Roe or others from making the same article at the same place, and using the name of the place merely geographically or to show their place of business or as their address; but they must not use it as the name of their book-case. Indeed, unless they aim to deceive the public, they would not desire to so use it. If their article is as good or better than that of Doe, there would be no incentive to do so. It will not do to say in such a case that as Roe's manufactory is at Mt. Sterling, therefore he, a new-comer, may give his book-case the same name as Doe's, because equity will not enjoin against telling the truth. It is done for deceit; and when so done, it cannot be said in a true sense that it is done truthfully. It is at best but a nominal truth, amounting to a deception. There is really a false representation, which equity, from a sense of common justice, will enjoin. A person's name may be a trade-mark, as "Decker Brothers" upon pianos. There may be other brothers of the same name, and they could in a certain sense truthfully use the same name upon pianos, which they might subsequently begin to manufacture; and a man cannot be deprived of the right to use his own name; but in such a case he must use it as his own name, and not as the name of his goods.

Each case must, of course, turn upon its own particular circumstances. Browne on the Law of Trade-marks, section 192, says: "A word may be considered to be geographical or not according to the circumstances of the case," and evidently a distinction should be drawn between the use of a geographical name, indicating the particular manufacture of a certain person, and its use in describing a natural product of a particular locality, possessing qualities depending upon the place.

The above view, we think, is supported by both reason and authority. We shall refer to but few cases, although many have been examined.

In the *Anatolia Liquorice Case*, 10 Jur., N. S., 550, the complainants were manufacturers of a new character of liquorice out of materials obtained from different places, upon which they stamped the name "Anatolia." The name as used was held to be a trade-mark. Mr. Browne, in speaking of this case, says: "This is a recognition of the doctrine that a geo-

graphical name may cease to be merely such, and acquire a new function as an arbitrary symbol: Browne's Law of Trade-marks, sec. 184.

The *Glenfield Starch Case*, L. R. 5 H. L. 508, appears to have been well considered. There the plaintiffs, as in this case, were the assignees of the business, and had removed their manufactory from the little village of Glenfield to Paisley, but still continued to use the word "Glenfield" upon their starch. The defendant, residing at Glenfield, and doing business in the very house previously used by the plaintiffs, began to make what he termed upon his labels "Glenfield Starch." He was enjoined from so using the name: *Siegert v. Findlater*, L. R. 7 Ch. Div. 801, is to the same effect.

The opinions in *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588, and *Lea v. Wolf*, 15 Abb. Pr., N. S., 1, appear to have been based mostly upon an intended fraud; but where a trade-mark is infringed, the false representation, either directly or indirectly made, is really the essence of the wrong.

The Moline plow case (*Candee, Swan, & Co. v. Deere & Co.*, 54 Ill. 439; 5 Am. Rep. 125), and that of the *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416, do not, when closely examined, raise any conflict. In the one the word "Moline" was used as an address, while in the other the complainant was not the first user of the word "Brooklyn."

In the case now in hand, however, there is a conflict of testimony as to the prior use of the word "Lexington," in connection with the word "mustard." The labels of Burrowes show that he used it as an address. There is evidence tending to show that both McCullough and Yates and Dudley used it both ways. One of their labels indicates its use as a part of the name of their article, while another shows it as an address merely. There was at most no uniformity as to its use by them. It is shown that Metcalfe used it in connection with the word "mustard" upon a former label of his, and while Yates and Dudley were engaged in the business; but the exact time when he began to do so does not appear, further than that it was two or three years before they sold to Brand. The evidence that either Metcalfe or Yates and Dudley used it with any uniformity as a distinctive part of the name of their article is not of a satisfactory character. This uncertain use, whether as an address or as the name of the article, together with the doubt necessarily arising therefrom as to the prior use in the last-named way, forbid either party to this cen-

troversy from appropriating the word "Lexington," in and of itself, to his exclusive use as a trade-mark.

It was settled by the leading case of *Amoskeag Co. v. Spear*, *supra*, and a line of cases following it, that such a right will not be declared or protected unless clearly shown; and in the *Moline plow* case it was said: "The mark must be so clear and well defined as to give notice to others, and must not be deviated from at the suggestion of whim or caprice."

This rule does not of course interfere with the right of the same person to two different trade-marks; but if he seeks to appropriate one to himself, he must do it by no uncertain use.

The question whether the appellant, Metcalfe, has so far imitated the packages of the appellee, Brand, as to entitle the latter to protection from a court of equity, remains to be considered.

Every manufacturer has a right to indicate his goods in some way, as by a particular label or wrapper. The law gives this right, not only to secure to him the just reward of his skill and enterprise, but to protect the public from imposition and fraud. This is the basis of all legal interference in trade-mark cases, and upon principle, a person is as much entitled to be protected in the use of a particular label as in the use of a trade-mark. If one uses the label of another, or a colorable imitation thereof, it is a false representation, done for the purpose of imposing his goods upon the public as those of his rival in trade, thereby injuring the one and defrauding the other. Equity will not permit the use of means that are calculated to deceive and to divest another of his right. It will not permit A to sell his goods as those of B, or use means contributing to this end; and in preventing him from so doing, it proceeds both upon the ground of protection to A's right and the public interest. The simulation need not be exact. The label or covering need not be copied with slight changes even. If it be substantially imitated, and so essentially alike that persons of ordinary observation and the unsuspecting public are likely to be deceived, it is sufficient to authorize equitable intervention. There need be no *mala mens* toward the first purchaser of the imitation article. The simulation may enable him to retail it as the genuine article, but at a lower price, and thus injure the manufacturer and delude the public. Here, again, each case must depend upon its own circumstances.

How is it in this one? We have before us two round tin

cans of the same size. The tops of each are fastened with a strip of similar colored cloth. One has upon it the blue label of Brand, and the other the blue label of Metcalfe. A glance is sufficient to satisfy one of the resemblance of the two packages, it is so striking. We would disbelieve the evidence of our senses if we were to doubt that the one is an imitation of the other. As to the labels, the size is the same; the ground color is the same; each has a white border; the letters are of the same color, and strikingly alike in size; the directions for use are the same, and the words of the caution, although odd, nearly resemble. It is noticeable that the label of the appellee greatly resembles the blue label of both McCullough and Yates and Dudley. He began using it in the latter part of September or first of October, 1877. He moved to Louisville that fall; and then, and in November, 1877, Metcalfe began for the first time to use this blue label, the cautionary words upon it, and the strip of cloth. He had formerly used a different blue label, but even it upon square cans only. It is impossible to account for all this imitation, so complete in form and detail, so likely to deceive, save upon the theory that the purpose was to obtain the benefit of the reputation of the appellee's mustard. It could hardly have been accidental. One cannot be allowed to thus sail under a piratical flag.

Even if there was no intentional fraud, yet the simulation is such as is quite likely to deceive customers as to an article now on sale; and the impending or further actual injury to the appellee should be checked by injunction: *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204; *Partridge v. Menck*, 2 Sand. Ch. 622.

It is one of the principal offices of equity to prevent injury and imposition. Therefore, even if the imitation was unintentional, yet be colorable, and of such a character that a majority of persons would never notice the difference, its use will be enjoined. Otherwise, the purchaser would have imposed upon him a spurious article, and the maker of the genuine be deprived of the profit which he has labored for years, perhaps, to realize. A person may of course use any color or words in common use, or other *indicia*, upon his label, or in connection with his goods; but fair competition and common honesty require him to so use them as not to imitate those of another. Any other rule would but sanction fraud and deceit.

If there was a defect of parties plaintiff by the non-joinder

of Osborne, it was shown by the petition. There was no demurrer upon this ground; and therefore, under section 92 of the Civil Code, it was waived.

Judgment affirmed upon both the original and cross appeal.

TRADE-MARKS, LAW RELATING TO, GENERALLY: *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147; 2 Am. St. Rep. 73, and note 81; *Pratt's Appeal*, 117 Pa. St. 401; 2 Am. St. Rep. 676, and note 681; *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338; 2 Am. St. Rep. 898, and note 901.

DAVIDSON v. MORRISON.

[86 KENTUCKY, 897.]

ANCIENT DEEDS MAY NOT BE READ AS EVIDENCE AGAINST AN ADVERSE CLAIMANT IN POSSESSION, with his title of record to establish, on the part of the plaintiff, a right of entry, where no possession prior to the execution of the deed under the same chain of title, or since its execution, has been shown.

ACTION WILL BE REGARDED AS ONE IN EQUITY BY THE BENEFICIAL OWNER AGAINST CLAIMANTS IN POSSESSION FOR THE RECOVERY OF LAND, where the relief sought is to recover the same, have it sold, and the proceeds divided as directed by will, which cannot be done until those in possession are ousted, and the beneficiaries are in court, and an issue as to the title is made, and must be determined before the land can be sold. The defendants failed to demur, but accepted the issue tendered.

PRACTICE.—IN EJECTMENT, IT IS TOO LATE TO RAISE QUESTION IN SUPREME COURT FOR THE FIRST TIME AS TO THE RIGHT of the beneficial owner to maintain the action, at least without making the holder of the legal title a party.

IN ACTION OF EJECTMENT, COURT WILL NOT DISTURB FINDING OF COURT BELOW AS TO HEIRSHIP, even if it be conceded that the testimony preponderates in favor of plaintiff.

J. W. Bush, J. K. Hendrick, and W. R. Bush, for the appellant.

W. D. Greer, William Lindsay, John T. Shelby, and George B. Kinkead, for the appellees.

PRYOR, C. J. This is an action in the nature of an equitable ejectment, instituted by E. C. Davidson, in the Livingston circuit court, against the appellees, E. E. Morrison, M. J. Anderson, C. M. Powell, and William Talbott, to recover several tracts or parcels of land held and owned in severalty by the above-named defendants. The land in controversy is claimed by the plaintiff through the patentee, Christopher Roan, who, it is alleged, held two patents,—one for one thou-

sand acres, dated October 18, 1787, and the other for four hundred acres, dated May 3, 1775.

The patentee, it is claimed, left at his death two children, who were his heirs at law, named James Roan and William Roan, and by an amendment, it is alleged that this was a mistake; that Christopher Roan, the patentee, died without children, and James and William Roan were his brothers, and inherited the estate; that James and William, being thus invested with title, sold and conveyed by deed their land in August, 1797, to one Robert Moore; that Robert Moore devised the land to his son, Archibald Moore, and that Archibald Moore devised it to his wife, Maria M. Moore, during her life, with the power to sell to pay certain legacies, if necessary, and at her death directed that the same might be sold, and the proceeds distributed among such of the children of William Davidson, then in the city of London, as might be living at the period of her death.

The widow (Maria) afterward married one Robertson, and died in November, 1873. She had no children by her first husband, so the children of William Davidson, who were alive at the death of Maria, took under the will of Archibald Moore. Their names were E. C. Davidson, Agnes Sibley, and Mary Jane Kyle. E. C. Davidson purchased the interests of Mrs. Sibley and Mrs. Kyle, and thereby became the absolute owner of the property devised to the children of William Davidson by the will of Archibald Moore. In this manner he derives title, and as sole plaintiff institutes the present action.

The defendants deny the title of the plaintiff, and place him by the issue made upon his right to recover; plead title in themselves, and also an adverse holding for more than thirty, or at least fifteen, years. All the defendants but Talbott say that the one thousand acres of land was patented to Christopher Roan; that he died leaving two children, John and Elizabeth; that John died without children, leaving a will by which he devised his interest in the land to his sister, Mrs. Lawrence (Elizabeth having married Lawrence), for life, remainder to her son Samuel; that Mrs. Lawrence died, leaving as her children Samuel, Louisa Sledge, and Mrs. Killough; that Samuel died after his mother childless, and his interest passed to his two sisters; that Mrs. Sledge and her husband conveyed her interest to her sister, Mrs. Killough, by deed of record in the Livingston County clerk's office, and that Mrs. Killough and her husband, on the 15th of March, 1847, con-

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veyed the one thousand acres of land to Harvey Lewis, by a recorded deed in same office. In August, 1850, Lewis sold and conveyed this land to L. M. Flournoy. On the 30th of August, 1860, Flournoy conveyed the land, in conjunction with Trabue, Cade, and others, to Jennings, and that Jennings then sold a part of this one-thousand-acre tract to the defendant Anderson, — three hundred acres, — and made him a deed; and five hundred and fifty-three acres to M. E. Morrison, etc. All of these deeds under which the defendants claim were of record in the Livingston County clerk's office, beginning in the year 1847, and the title passing to the successive vendees from that date until this action was brought against the present defendants, who, with this title and their respective deeds, were in the actual possession.

Talbott, one of the defendants, claims, as the others do, under Flournoy, and he from Harvey Lewis; Lewis having purchased both the one-thousand and the four-hundred acre tract of Mrs. Killough, who claimed to be the sole owner by descent, and purchased from those claiming under Christopher Roan, the original patentee. The court below on the hearing dismissed the petition of the appellant, and he now appeals.

The facts of this record show that neither the original patentee or his descendants, who are claimed to be such by the appellant, nor any of the purchasers from them, ever entered upon any part of this land at any period of time from the date of the patents (more than a century ago) up to the institution of the action.

It is claimed by the appellant, who is the plaintiff below, that James and William Roan, through whom he derives title, were the children of Christopher Roan, the patentee, and that fact he himself proves from family tradition, — that of his own family, and not those related to or descended from Christopher Roan. Those who are claimed to be related to the patentee give but little information as to his family history. One witness states: "Upon the hypothesis that he was his grandfather's brother, he must have been my great-uncle." He had heard nothing specially from the older members of the family in regard to the matter, but is of the opinion that Christopher Roan died childless. Others say, from family tradition, they are of the opinion that James and William Roan were the brothers of Christopher Roan; but fail to give anything like a history of the family, or to give even the

names of any person or persons of their own family with whom they conversed on the subject.

The weight of the testimony on the subject of heirship might preponderate for the appellant, if aided in any manner by a claim of ownership before this action was instituted. Here was a valuable tract of land, located on or near the Ohio River, that was being sold to innocent parties for value, and the most of it at its full value; deeds recorded, and farms opened on the land upon which the children and grandchildren of the present occupants, or some of them, have been raised, and no claim of title set up by either Mrs. Moore, the life tenant, or her co-executor, during the half-century transpiring between the death of her husband in 1822 and her death in 1878. Those in remainder must have been aware of their interests, if they had any, and in coming to assert title under one who was of Revolutionary fame, we find that family tradition has not only been lost sight of in the attempt to make out the chain of title, but the conveyances from those who are alleged to have been the brothers of the patentee have never yet been recorded, but kept in the family of the present plaintiff and the life tenant, and exhibited for the first time in the trial of the present action as ancient and unrecorded deeds evidencing title in the plaintiff, who was never in possession, or those under whom he claims, against those who were and had been in the actual possession of the land under a hostile claim for more than thirty years, with deeds of record.

The conveyance from William Roan, executed in 1797, was never recorded, and that of James Roan, executed in 1798, was recorded in the clerk's office of the court of appeals, but not properly authenticated, — so both deeds, alleged to have been from the two brothers of the patentee, have no virtue except as ancient writings; and we find no authority holding in a case like this that they may be read as evidence of title by those who were never in possession against those holding under an adverse title with a possession long enough to ripen into a title.

Mr. Greenleaf, in his work on evidence, volume 1, says: "Whether if the deed be a conveyance of real estate, the party is bound first to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight of opinion seems to be in the negative, as will hereafter be more fully explained." In explanation of this doctrine, he

says: "But where unexceptionable evidence of enjoyment referable to the document may reasonably be expected to be found, it must be produced": 1 Greenl. Ev., pp. 31, 191, secs. 21, 143. In a note to the sections referred to, Blackburn, J., says: "Inasmuch as, after a long time, all the witnesses who could prove such possession are dead, the law permits ancient documents to be given as evidence, from which the jury may properly draw an inference that there was such possession." And further says Mr. Greenleaf: "If such evidence referable to the document is not to be expected, still it is requisite to prove some acts of modern enjoyment with reference to similar documents, or that modern possession or user should be shown corroborative of the ancient documents." Mr. Wharton, in his work on evidence, says: "It has been frequently held that there must be accompanying possession to enable a deed over thirty years old to be read in evidence without proof of its execution; but this doctrine cannot be sustained on principle. Proof of contemporaneous possession is unnecessary, though without such proof the deeds may be entitled to little or no weight."

We find no reported case in this court holding that such deeds may be read as evidence against an adverse claimant in possession with his title of record, to establish on the part of the plaintiff a right of entry where no possession prior to the execution of the deed under the same chain of title, or since its execution, has been shown. Under our system of registration, the title to realty may be easily traced, and one's entry on land, a title to which is in another, affords him no protection unless he has the prior right. He may even enter under the same title as junior purchaser without notice of his adversary's claim, actual or constructive, and having thus acquired the legal title, hold the land as his own. So the danger of permitting ancient deeds to prove themselves in order to establish title, or to evidence the right of entry, or that the parties at one time held possession under them, may be readily seen, and particularly against those with a title of record. The cases of *Cook v. Totton*, 6 Dana, 108; *Thruston v. Masterson*, 9 Id. 228; *Winston v. Gwathmey*, 8 B. Mon. 19; *Burgin v. Chenault*, 9 Id. 285; and *Taylor v. Cox*, 2 Id. 429,—all sustain the right of the plaintiff to rely on such ancient writings to sustain the possession.

They may be competent to show the extent of possession, or to evidence in some cases the facts recited in them, or even

to show the right of entry against one without title; but in the absence of a possession under them, the offer to make the chain of title perfect by this character of evidence, to defeat a title of record and a possession under it for more than thirty years, will not be listened to by either the common-law judge or the chancellor. These deeds were read after the lapse of eighty years to show a right of entry only, with the life tenant and the remainderman in the possession of them during the greater part of that period, and no claim of title at any time asserted until this action was instituted.

If entitled to any weight as evidence of title or a former possession, it is so slight as to have authorized the chancellor to disregard them.

The defense claimed to hold, and did hold, under title deeds from John and Elizabeth Roan, or through them by successive deeds dated and recorded as far back as 1847, connected with a continued possession since that time.

The fact that John and Elizabeth Roan were the children of the patentee is not shown except by the recitals in the deeds of the defendants, and the proof by the plaintiff himself that the patentee left two children.

This long-continued possession by the defendants has been under the title of the descendants of John and Elizabeth Roan, who, as is alleged, were the two children of the patentee. One set of claimants have been in the continued possession, and the other, the plaintiff and those claiming under the two brothers of the patentee, never had the possession.

The proof of heirship is therefore as persuasive on the one side as the other, and if conceded that the testimony preponderates for the plaintiff on this branch of the case, ought this court to disturb the finding below, whether this action be regarded as at law or in equity? It is at last an action for the recovery of the land, as the relief sought is to have the land sold and the proceeds divided as directed by the will of Archibald Moore. This cannot be done until those in possession are ousted by a *habere facias* or the judgment of the chancellor. The beneficiaries are in court asking the relief, and whether entitled to the proceeds or the land itself, the issue as to the title was made, and had to be determined before the land could be sold. The appellees failed to demur, either for the want of proper parties, or because the holders of the legal title were not before the court, but accepted the issue tendered, and it is now too late, for the first time, to raise the question

that these parties with the beneficial interest could not maintain the ejectment upon an equitable title. It must be regarded by this court as an action in equity by the beneficial owner against the claimants in possession for the recovery of the land.

The case was in this manner prepared and decided, and will be so considered in this court. If this is not in the nature of an ejectment by the parties entitled to the proceeds of the land to recover it from the defendants, then the appellant has no cause of action against these tenants in possession. If he seeks to recover the proceeds of the land alone, then the surviving executor of Archibald Moore, or a trustee appointed by the chancellor (if the executor is dead), should have instituted this action; and such would have been the character of the proceeding required below, but for the failure of the defense to raise the question as to the right of the beneficial owner to maintain the action, at least without making the holder of the legal title a party to the proceeding.

While the objection could have been listened to below, the question cannot now be raised in this court for the first time. The finding of the chancellor below ought not, therefore, to be disturbed, even if there was a preponderance of testimony for the plaintiff as to who were the heirs at law of the original patentee, and for the more formidable objection whether, at law or in equity, the plaintiff has failed to connect his title with the patent under which he claims. But viewing this case in either aspect, with the ancient deeds admitted, it is manifest the plaintiff is not entitled to recover. The question raised as to the purchase by Flournoy, of whom the tenants in possession purchased, from the widow of Archibald Moore, of her interest in the land as affecting the present owners, has also been considered. It appears that Flournoy had, prior to his purchase of the interest of the widow of Archibald Moore, bought the land from Harvey Lewis, who had purchased from Mrs. Killough, the descendant of, or who claimed to be the descendant of, the patentee on the defendants' side of this controversy. Flournoy obtained title in various ways to this land. He was evidently, after his purchase from Lewis, trying to buy his peace. He purchased from McCauley's heirs, who had entered a part of this land; also of Enders, and laid a warrant himself on part of it. He swears that he did not know what title Mrs. Robertson had, and in fact don't recollect of ever having purchased it. The fact is, that Calvin

Piles, as the attorney in fact of Mrs. Killough, took possession of this land in 1842, and those holding under her have never been out of possession. The title of the defendants must now be regarded as complete, not by the lapse of time, but because the record title, with the long-continued possession, must defeat a recovery based solely upon the traditional testimony of ownership attempted to be shown by the plaintiff.

The judgment of the chancellor is therefore affirmed.

WHAT CONSTITUTE "ANCIENT DEEDS" IN THE UNITED STATES, AND WHEN THEY ARE ADMISSIBLE IN EVIDENCE. — It is well settled that a deed over thirty years old which has not been altered, or which is otherwise free from suspicion, and which comes from the proper custodian, is admissible in evidence without further proof, a reasonable presumption of the genuineness of such deeds being afforded by the fact that they are over thirty years old, and are unblemished by any alterations, the witnesses being presumed to be dead, or beyond the jurisdiction of the court: *Harlan v. Howard*, 79 Ky. 373, 376; *Doe v. Roe*, 31 Ga. 593; *Hathaway v. Evans*, 113 Mass. 264, 267; *Beaumont Pasture Co. v. Preston and Smith*, 65 Tex. 448; *Holmes v. Coryell*, 58 Id. 680, 688; *Mapes v. Leale's Heirs*, 27 Id. 345; *Green v. Chelsea*, 24 Pick. 71; *Burgin v. Chenault*, 9 B. Mon. 285, 286; *Nixon v. Porter*, 34 Miss. 697; 69 Am. Dec. 408; *Hedger v. Ward*, *Hobbs v. Hedger*, 15 B. Mon. 106; *Crane v. Marshall*, 16 Me. 27; *Hind v. Vattier*, 1 McLean, 110; *Stoddard v. Chambers*, 2 How. 284, 316; 2 Best on Evidence, Waterman's notes, sec. 52; 2 Wharton on Evidence, sec. 1359; 2 Phillips on Evidence, Cowen, Hill, and Edwards's notes, secs. 475 et seq.; note to *Jackson v. Blanshan*, 3 Am. Dec. 490; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Doe ex dem. Farmer's Heirs v. Belava*, 11 Ala. 1028; *Carter v. Chandron*, 21 Id. 72; *White v. Hutchings*, 40 Id. 253; *Settle v. Alison*, 8 Ga. 201; 52 Am. Dec. 393. The rule is "adopted for common convenience, and is founded upon the great difficulty of proving the due execution of the deed": *Winn v. Patterson*, 9 Pet. 663, 675. Such rule applies not only to grants of land, but to all other deeds which come from the custody of the proper party, and it includes wills, bonds, and like instruments of a formal character: *Bell v. Brewster*, 44 Ohio St. 690, 694; *Winn v. Patterson*, *supra*. So a pay roll of a military company of the war of 1812, on which is a receipt by a soldier of money paid him, is admissible in evidence under the rule: *Bell v. Brewster*, *supra*. In this last case it was also decided that the proper depository of such deeds is the usual place of keeping such instruments. It is not sufficient, however, "that the instrument merely bears date thirty years before the time of its production. It is necessary to show that it has been in existence for that period of time, and that may be done, not only by evidence of its execution by the maker, or of its possession by the party claiming under it for that period, but by circumstances creating the presumption of such evidence": *Fairly's Adm'rs v. Fairly*, 38 Miss. 280, 290. But a deed which is thirty years old at the time of trial is such an ancient deed as to be admissible if otherwise competent, although it was not thirty years old when the action was commenced: *Gardner v. Graniss*, 57 Ga. 539, 555. Qualifications to the general rule above stated are, however, implied in some of the cases. As in *Thompson v. Brannon*, 14 S. C. 542, 551, where it is said that such deed is admissible if the witness be dead, so such deed is admissible if not liable to suspicion as to its date: *Brown v.*

Wood, 6 Rich. Eq. 155, 171. So an ancient document more than thirty years old is admissible when absence from its proper place is satisfactorily accounted for, and suspicions against its genuineness removed: *Gibson v. Poor*, 21 N. H. 440; 53 Am. Dec. 216; and it may be read in evidence unless there is a living witness capable of being produced: *Smith v. Rankin*, 20 Ill. 14, 23. This last rule, however, is *contra* to that stated in *Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393, where it is declared that a witness to such ancient deed, although living, need not be called. See also *Jackson v. Christman*, 4 Wend. 277. Another implied requirement is, that the deed has been acted on so as to give some corroborative proof of its execution: *Holmes v. Coryell*, 58 Tex. 680, 688. So the mere fact that a will is thirty years old does not of itself entitle it to be read without further proof: *Jackson v. Luquere*, 5 Cow. 221. So in Taylor on Evidence, section 104, some doubt seems to exist as to whether the rule applies to an instrument bearing a seal of a court or corporation, because such seals, being of a permanent character, may be proven at any distance of time from the date of the instrument. And the rule is further qualified, in that the execution of such deeds may be disproved: 2 Best on Evidence, Waterman's notes, sec. 362.

WHETHER POSSESSION UNDER THE DEED IS ESSENTIAL. — It is certainly true that acts of possession are strong evidence of the genuineness of such deeds, and that the courts where such possession exists have declared in favor of the admissibility of such ancient deeds: *Nixon v. Porter*, 34 Miss. 697; 69 Am. Dec. 408; *Bell v. McCawley*, 29 Ga. 355, 360; *Gittings's Lessee v. Hull*, 1 Har. & J. 14; 2 Am. Dec. 502; *Jackson v. Luquere*, 5 Cow. 221; *Bennett v. Runyon*, 4 Dana, 422; *Roberts v. Stanton*, 2 Muf. 129; 5 Am. Dec. 463; *Fetherly v. Waggoner*, 11 Wend. 599; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351; *Jackson v. Davis*, 5 Cow. 123; 15 Am. Dec. 451; *Crane v. Marshall*, 16 Me. 27; 33 Am. Dec. 631. Another question, however, which has frequently arisen, and concerning which there has been some conflict among the earlier cases, is, whether possession under such ancient deed is essential. The great weight of authority, however, is, at the present day, that such possession is not necessary or essential: *Holmes v. Coryell*, 58 Tex. 680, 688; *Hewlett v. Cock*, 7 Wend. 371. In determining this question, the following is in point: "It has been settled by the weight of authority that ancient deeds of conveyance of real estate are admissible without first requiring the party offering them to show acts of possession over the lands embraced by them; . . . the genuineness of such instruments may be shown by other facts as well as that of possession; and when proof of possession cannot be had, it is within the very essence of the rule to admit the instruments, where no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it": *Harlan v. Howard*, 79 Ky. 373, 376, citing several cases. It is also said in 1 Greenleaf on Evidence, section 144, note 1, that "it has been made a question whether the document may be read in evidence before the proof of possession or other equivalent corroborative proof is offered. . . . It is now agreed that where proof of possession cannot be had, the deed may be read if its genuineness is satisfactorily established by other circumstances"; citing *Lord Rancliffe v. Parkins*, 6 Dow, 202; *McKenire v. Fraser*, 9 Ves. 5; *Doe v. Passingham*, 2 Car. & P. 440; *Barr v. Gratz*, 4 Wheat. 213, 221; *Jackson v. Laroway*, 3 Johns. Cas. 283, 287; *Jackson v. Luquere*, 5 Cow. 221, 225; *Jackson v. Lamb*, 7 Id. 431; *Hewlett v. Cock*, 7 Wend. 371, 373, 374; *Willson v. Betts*, 4 Denio, 201; see also 1 Wharton on Evidence, secs. 199, 733; but examine *Lan v. Mumma*, 43 Pa. St. 267, 274; *Shanks v. Lancaster*, 5 Gratt.

110; *Homer v. Cilley*, 14 N. H. 85; *Ridgely v. Johnson*, 11 Barb. 527; *Bank of Middlebury v. Rutland*, 33 Vt. 414; *Distrager v. Maitland*, 12 Leigh, 524.

THE FOLLOWING DOCUMENTS HAVE BEEN ADMITTED IN EVIDENCE UNDER THE RULE GOVERNING ANCIENT DEEDS: A will over thirty years old: *Fetherly v. Waggoner*, 11 Wend. 599; even though the attestation clause of such will does not strictly conform to the legal requirements: *Jackson v. Christman*, 4 Id. 277; a will more than fifty years old with the probate attached: *Northrop v. Wright*, 24 Id. 221; but the time is computed, not from the date of the will, but from the testator's death: *Jackson v. Blanshan*, 3 Johns. 292; a bounty warrant, under which title to land is claimed: *Shinn v. Hicks*, 68 Tex. 277, 279; a certified copy of a deed duly recorded: *Stokes v. Dawes*, 4 Mason, 268; *Brown v. Simpson's Heirs*, 67 Tex. 225, 232. But a record copy of a deed which is not required to be enrolled is not admissible: *Gittings's Lessee v. Hall*, 1 Har. & J. 14; 2 Am. Dec. 502; an ancient town plat or survey: *Gibson v. Poor*, 21 N. H. 440; 53 Am. Dec. 216; licences which purport to show the ownership of land, and are more than sixty years old, are admissible in proof of the licensor's title: *Boston v. Richardson*, 105 Mass. 351, 372; copies of ancient proprietary grants: *Pitts v. Temple*, 2 Id. 538; a book of records of proprietors of common lands over thirty years old: *Tolman v. Emerson*, 4 Pick. 160; ancient records and plans of a township: *Goodwin v. Jack*, 62 Me. 414; *McCausland v. Fleming*, 63 Pa. St. 38; a title bond: *Bennett v. Runyon*, 4 Dana, 422; titles held under allotments from the town of Boston may be established by an ancient book of records of the town, entitled the book of possessions, although such book is not properly authenticated: *Rust v. Boston Mill Corporation Co.*, 6 Pick. 158; a deed and power of attorney authorizing sale of the land: *Winn v. Patterson*, 9 Pet. 663; since the same principle by which such deeds may be admitted in evidence without proof may be applied to the power under which it purports to be executed: *Tolman v. Emerson*, 4 Pick. 160.

MISCELLANEOUS. — The admissibility in evidence of an ancient deed does not depend upon a proper certificate of acknowledgment: *White v. Hutchings*, 40 Ala. 253; 88 Am. Dec. 766. It is said in *Beaumont Pasture Co. v. Preston and Smith*, 65 Tex. 448, 451, where the question as to the admissibility of such deeds is fully considered, both under the law of that state and at the common law, that "in making the proof upon which such paper gets to the jury, the party opening it proceeds *ex parte*. If without considering other evidence than that produced by him there is enough to raise an issue of fact upon the genuineness of the document, it is proper for the court to allow the paper to go before the jury, and the issue of fact is then determined by them after hearing all the testimony on both sides. . . . The preliminary proof before the judge is merely an earnest of the issue. What shall be sufficient for this purpose cannot probably be embraced in a definition that would suit the peculiar facts of every case. It would be always proper to admit the paper when the proof is sufficient, if none opposing is offered, to sustain a verdict in favor of the genuineness of the instrument."

EJECTMENT, JUDGMENT IN, CONCLUSIVENESS OF: *Clark v. Thompson*, 47 Ill. 25; 95 Am. Dec. 457, and note 472; *Caperton v. Schmidt*, 26 Cal. 479; 85 Am. Dec. 187; *Payne v. Payne*, 4 Humph. 500; 79 Am. Dec. 402.

STANLEY v. COMMONWEALTH.

[88 KENTUCKY, 440.]

WHATEVER ONE MAY DO IN HIS OWN DEFENSE, ANOTHER MAY DO FOR HIM, EVEN TO KILLING, if he believes life is in immediate danger, or if such danger and necessity be reasonably apparent, provided the party in whose defense he acts was not in fault. He interferes, however, at his peril if the person slain was not in fault.

INSTRUCTION WHICH CONFINES THE RIGHT TO ACT IN DEFENSE OF ANOTHER TO THE EXISTENCE OF ACTUAL DANGER, and which does not allow the right to act in good faith upon appearances, however reasonable, is erroneous.

John Feland, R. W. Henry, and D. L. Johnson, for the appellants.

P. W. Hardin, attorney-general, for the appellee.

HOLT, J. The appellants, Renzy and Harmon Stanley, seek to excuse the killing of Rufus Ebling, upon the ground that it was done by them to save the life of William Stanley, who is the brother of the one and the uncle of the other.

It is a general rule, that whatever a person may lawfully do in his own defense, another may do for him. Mr. Bishop, in speaking of the right to assist others in defense of person and property, says: "The doctrine here is, that whatever one may do for himself he may do for another; . . . and on the whole, though distinctions have been taken and doubts expressed, the better view plainly is, that one may do for another whatever the other may do for himself": 1 Bishop on Criminal Law, sec. 877.

Another writer uses this language: "A well-grounded belief that a felony is about to be committed will extenuate homicide committed in prevention, but not in pursuit, by a volunteer. . . . A *bona fide* belief that a felony is in process of commission, which can only be arrested by the death of the supposed felon, makes the killing excusable; but the belief must be honestly entertained, and without negligence; and if non-negligent, it will excuse the homicide. . . . A person has a right to repel a felony threatened to be perpetrated either on himself or others. . . . The intentional infliction of death is justifiable when it is inflicted by any person in order to defend himself or any other person from immediate and obvious danger of instant death or grievous bodily harm, if he, in good faith and on reasonable grounds, believes it to be necessary when he inflicts it. . . . Self-defense will justify a person in defending those with whom he is associated, and in killing, if

he believes life is in danger; and the right may be exercised by the servants and friends of the party assaulted, or any one present, in repelling an attempted felony": Desty's American Criminal Law, secs. 125 d, 126, 126 a.

The courts were slow to adopt this doctrine in its full extent, doubtless for fear that it might be abused, and sometimes serve as a shelter to those who, under the plea of protecting the lives of others, merely executed their own guilty purposes. It was, however, declared by this court in the unpublished opinions in the cases of *Roberts v. Commonwealth* and *Smith v. Commonwealth*, and is not open to this objection when properly applied.

The right of self-defense rests upon necessity, and apparent reasonable necessity is the whole law and reason of it. It was not derived from society. It is a natural right, instinctive in the person. Man, when he came into society, brought it with him in all its freedom and broadest sense. It has been restricted by law in its exercise to cases of necessity, but cannot be altogether denied. If it were possible, it should not be, because, as now restricted, it serves to protect right against wrong in emergencies where the law would not avail.

It is the duty of a man who sees a felony attempted by violence to prevent it if possible. This is an active duty, and hence he has a legal right to use the means necessary to make the resistance effectual. If A be unlawfully assaulted by B, and his life thereby endangered, he may, by reason of not being in fault, defend it even to the extent of taking the life of the person who is in fault; and as the right is a natural one, rules of law restricting it must, in order that it may still be effective, be adapted to his character and nature. He may, therefore, act upon appearances, if he acts reasonably; and if assailed by another, and he believes, and has reasonable ground to believe, that his life is thereby endangered, he may even take life in its apparent necessary defense. So great, however, is the law's regard for human life, that he must be careful and not violate the restriction that law and society have placed upon this right of self-defense, to wit: he must act from necessity, or reasonable apparent necessity, and not be in fault.

Not only, however, may he do this, but another may do it for him. This other person, in such a case, steps into the place of the assailed; and there attaches to him not only the rights, but also the responsibilities, of the one whose cause he

espouses. If the life of such person be in immediate danger, and its protection requires life for life, or if such danger and necessity be reasonably apparent, then the volunteer may defend against it, even to the extent of taking life, provided the party in whose defense he acts was not in fault. He interferes at his peril, if the person slain was not in fault. In the language of Mr. Wharton, "a person interposing, particularly if he be a stranger, should act with much caution." This necessarily follows, because he takes the place of one of the combatants, and can only do for him what he had the right to do under the circumstances in defense of himself. Thus if A unlawfully assaults B, endangering the latter's life, C has no right, because he may come upon the scene of conflict at a time when, during its progress, A is in danger, to kill B. This would be murder in C, just as it would in A. Any other rule could not be tolerated. The innocent cannot be sacrificed to save the guilty. This would be paradoxical. A volunteer must not kill in behalf of one in fault. This would be what some writers have termed a negligent killing. He may, however, do so for one not in fault, if the impending danger thus brought about be either actual or apparent. In other words, as the person not in fault may, if he believes, and has reasonable grounds to believe, that his life is in immediate danger, defend it to the extent of taking life, so another may act upon the like appearances as to such danger, and defend it for him to the same extent. Here a felony is attempted; and in killing the attempter, through the necessity to save an innocent person, the one so doing is in the condition of *se defendendo* in defending the one not in default. In such a case, the doctrine of self-defense in all its principles extends to the accused, just as it would if the felony had been attempted upon him, or as it would apply to the one in danger if he had done the killing.

Applying this rule to the case in hand, the judgment cannot stand. The fourth instruction reads thus:—

"The court instructs the jury that, in addition to the right of self-defense as defined in instruction No. 3 (relative to the right of self-defense upon the part of the accused when he is in danger), that if they believe from the evidence that, at the time of the killing of Rufus Ebling by Harmon and Rensy Stanley, if they did so kill him, the said Ebling was then unlawfully, willfully, and feloniously, and not in his own necessary self-defense, about to kill William Stanley, or about to

inflict great bodily harm upon him with a deadly weapon, maliciously and unlawfully, and not in his own necessary self-defense, then the said Harmon and Renzy Stanley might lawfully interfere to prevent said injury, and might even take the life of said Ebling, provided such extremity be necessary to prevent such killing of or injury to William Stanley; and provided further, that said Harmon and Renzy Stanley had not theretofore and in said rencounter been engaged in an unlawful attack with force and arms on said Ebling."

After what we have said, it is unnecessary to comment at length upon this instruction. It is evident that it confined the right of the appellants to act in defense of William Stanley's life to the existence of actual danger to it. It did not allow them to act in good faith upon appearances, however reasonable. Under it they could only act if, as a matter of fact, in the judgment of the jury, the life of William Stanley was, at the time of the killing, in actual danger at the hands of the deceased, and an actual necessity existed for the killing.

We intimate no opinion as to the character or weight of the evidence. As there must be another trial, it would not be proper to do so. It is sufficient to say that there was sufficient testimony to authorize the submission of this ground of defense to the jury; and, as indicated above, it was not done in proper form.

Judgment reversed, and cause remanded for further proceedings in conformity to this opinion.

HOMICIDE, WHEN JUSTIFIABLE ON GROUND OF SELF-DEFENSE: *Shorter v. People*, 2 N. Y. 193; 51 Am. Dec. 293, note; and see *Jones v. State*, 8 Am. St. Rep. 449, and note 450; self-defense in one's business office: *Morgan v. Dufee*, 69 Mo. 469; 33 Am. Rep. 508; in one's dwelling-house: *State v. Patterson*, 45 Vt. 308; 12 Am. Rep. 200; *State v. Moore*, 31 Conn. 479; 83 Am. Dec. 159.

PERSON MAY REPEL FORCE BY FORCE when he himself, or any of these his relations, husband and wife, parent and child, master and servant, be forcibly attacked in his person or property: *Dukes v. State*, 11 Ind. 557; 71 Am. Dec. 370.

CENTRAL PASSENGER R'Y Co. v. KUHN. LOUISVILLE AND NASHVILLE R. R. Co. v. KUHN.

[86 KENTUCKY, 578.]

IT IS GROSS NEGLIGENCE FOR RAILROAD COMPANY, WHOSE ROAD CROSSES PUBLIC THOROUGHFARE, NOT TO KEEP FLAGMAN at such point at night, there being no bars or gates erected, and there being a dense population on each side of the track, over which trains are constantly passing.

NEGLECTANCE MAY BE IMPUTED TO STREET-CAR COMPANY whose road intersects steam-car tracks, where a driver of one of its cars takes no pains to satisfy himself of the approach of a train, when others on his car see it coming in time to enable him, by exercising the slightest diligence, to avoid an accident, but instead of so doing, he attempts to cross in front of the train with his car, in consequence of which an injury results.

IN ACTION FOR INJURY ALLEGED TO HAVE BEEN CAUSED BY NEGLIGENCE OF DRIVER OF STREET-CAR, BURDEN OF PROOF is on company, as defendant, to show that the injury originated from causes beyond the driver's control. Negligence is presumed from the mere fact of injury, in such case; but where the direct cause of injury results from the act of another over whom the carrier has no control, the burden is on plaintiff.

CARRIER OF PASSENGERS—DUTY OF DRIVER OF STREET-CAR—INSTRUCTION may be refused, "that it was not the duty of the driver of the street-car company to stop his train, and go ahead on foot to the crossing to see if a train was approaching, unless he had reasonable grounds to believe a train was approaching." The court could not, as a matter of law, adjudge that such caution could be dispensed with, and as there was no conductor or other person on the car to exercise such vigilance, the probability of danger imposed such duty on the driver. A sufficient force should be employed at an unguarded and dangerous steam-railroad crossing to avoid danger to passengers in street-cars.

CARRIERS OF PASSENGERS—NEGLIGENCE. — Failure of steam-railroad company to properly provide for public safety at dangerous highway crossing does not relieve from negligence of its employees a street-railroad company whose track intersects the other.

CARRIERS OF PASSENGERS—CONCURRENT NEGLIGENCE—DEGREE OF DILIGENCE REQUIRED OF STREET-RAILWAY COMPANY AND STEAM-RAILWAY COMPANY DIFFERS, where action is for injury sustained by passenger of the former company by reason of negligence of driver in attempting to cross railroad track in front of approaching train, and the action is against both companies, and charges concurrent negligence against the latter.

EVIDENCE—IN ACTION FOR INJURY, THE FACT THAT COURT EXCLUDED CITY ORDINANCE REQUIRING STEAM-RAILROAD COMPANY TO HAVE FLAGMAN at crossing cannot avail street-car company for the gross negligence of its employee, resulting in the alleged injury at the crossing, although both companies were co-defendants.

MEASURE OF DAMAGES—INSTRUCTION. — **IN ACTION FOR INJURY CAUSED BY DEFENDANT'S NEGLIGENCE,** testimony of plaintiff that he had a wife and three children is not calculated to mislead or influence the jury, and is therefore not prejudicial, where, by its instruction, the court guides the jury plainly as to the compensation or damages the plaintiff is entitled to receive; and especially is it not prejudicial, where, in addition

to the general instruction as to damages, this special interrogatory was propounded to the jury by the court, "What sum in damages will reasonably compensate the plaintiff for the injuries sustained by him?" and the response by the jury was, "We say five thousand dollars," and the verdict of the jury is also sustained fully by uncontradicted testimony of skilled surgeons and physicians as to the character and effect of the injury.

DAMAGES MAY BE SEVERED AGAINST JOINT TRESPASSERS, with the right on the part of the jury to punish the wrong-doer to the extent of his participation in the wrongful act, and if one is more guilty than the other, to punish him more severely: Kentucky Statutes, Act 1839; and if this statute were not in force, a reversal on account of the damages being severed would only result in directing a joint judgment against the defendants for the real amount of damages assessed.

Barnett, Noble, and Barnett, and William Lindsay, for the appellants.

Brown, Humphrey, and Daire, for Central Passenger Railway Company.

O'Neal, Jackson, and Phelps, and Kohn and Barker, for the appellee.

PRYOR, C. J. The appellee, Christ Kuhn, instituted the present action in the Jefferson court of common pleas against the Central Passenger Railway Company and the Louisville and Nashville Railroad Company, in which it is alleged that when a passenger on the cars of the Passenger railroad company he was injured by being thrown out of the car by reason of a collision between the cars of that company and those of the Louisville and Nashville Railroad Company, caused by the joint negligence of the employees of each defendant.

The accident occurred in the eastern part of the city, at the corner of Baxter Avenue, at a point where the city railway cars crossed the track of the Louisville and Nashville railroad. There was a verdict assessing the damages at five thousand dollars, and then a several finding by which the city railway company was required to pay three thousand dollars of the damages, and the Louisville and Nashville Railroad Company two thousand dollars. Both of the railroad companies have appealed.

The plaintiff was injured about nine o'clock at night, in July, 1884, the car in which he was riding being struck by the engine of the Louisville and Nashville Railroad Company in the attempt of the passenger-car to cross its track.

The question of negligence was properly submitted to the jury by special interrogatories, and by the instructions given

the jury finding that the injury was caused by the concurrent negligence of the two companies.

It is apparent from the testimony that each company was guilty of the grossest neglect, and liable to the appellee in damages for the injury sustained by him.

It appears from the evidence that where the one track crossed the other was a public thoroughfare, used constantly by those passing in and out of the city, with street-cars crossing the track of the steam-railroad company many times during the day, and until a late hour at night; that the Louisville and Nashville Railroad Company kept a flagman at the crossing during the day to warn those passing of the approach of its trains, but at night no flagman was required to remain, and those passing this dangerous crossing, whether in street-cars or other modes of conveyance, left to provide for their own safety, and to risk the danger of being run over by constantly passing trains, with no other protection than their own knowledge as to the time the trains would pass, or their vigilance in noticing the train's approach. No bars or gates had ever been erected, and the trains running by steam day and night over the crossing, with a dense population on each side of the track, left to risk all the danger that was constantly menacing them at this particular point, and at a time when a vigilant flagman was most needed. Buildings were also located at or near the track, so as to obstruct the view of those crossing when looking in the direction this train approached on the night of the accident. Such a movement of railroad trains in the midst of a dense population, constantly passing over its track, without any one to give notice of the train's approach, was negligence of the most flagrant character.

As to the Central Passenger company, it is manifest that its driver was unfitted for his employment; that he took no pains to satisfy himself of the approach of the train, when others less interested than himself, and not on his cars, saw its approach in time for him to have saved himself, if he had exercised even the slightest care. Besides, when he discovered the train's approach, he attempted to cross the track in front of it, when, by the exercise of the slightest care, he might have avoided all danger. It is therefore plain that the injury complained of resulted from the negligence of both companies. It is proper to notice first some of the objections made by

counsel for the street-car company during the progress of the trial, and now complained of as error to its prejudice.

It is argued that the court below erred in adjudging that the burden of proof was on the street-car company (the collision being admitted) to show that the injury was not caused by its neglect, and at the same time holding that no such rule could apply to the Louisville and Nashville Railroad Company, the other defendant.

This record shows that the Central Passenger company was willing to assume the burden, and asked that it be allowed to first introduce its evidence, and the motion was overruled. The plaintiff was then required to make out his case of negligence against both defendants; but when the evidence was all in, the court permitted counsel for the Passenger company to conclude the argument, and it therefore seems to us that if either party was prejudiced by this action of the court, it was the plaintiff, and not the defendant.

The rule adopted in *Louisville and Portland R. R. Co. v. Smith*, 2 Duvall, 556, places the burden in this case on the company, and while that case may fail to distinguish properly the class of accidents to the passenger in which the burden is on the carrier from those where the burden is on the plaintiff, still in this case one of the grounds of complaint, or the negligence complained of, is the want of care on the part of the driver, and his want of fitness for the position given him.

Mr. Cooley on Torts, referring to a Pennsylvania case (*Laing v. Colder*, 8 Pa. St. 479; 49 Am. Dec. 533; *Sullivan v. Philadelphia and Reading R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 698), says: "*Prima facie*, where a passenger being carried on a train is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can or ought to control, as a part of its duty to carry the passengers safely; but this rule of evidence is not conclusive": Cooley on Torts, 663. The complaint in this case was the want of diligence in the driver, and the law will presume neglect from the mere fact of the injury, and the burden is on the defendant, who may show that the injury originated from causes the driver could not prevent. The passenger commits himself to the custody and control of the carrier, and if the car breaks, or the car while controlled by the

driver should strike an obstruction, as a wall or an embankment, the presumption of negligence arises, and must be overcome by the carrier on the complaint of the passenger injured by the accident. The accident may have been caused by the other defendant; but if so, it devolved on the company in charge of the passenger to show it. And further says Mr. Cooley: "Suppose a railway train thrown from a track from some cause not apparent, and the passengers are injured, would it be reasonable to put an injured person to the necessity of discovering and pointing out the cause, and tracing the fault to the company before he could recover? or may he, who has intrusted his person and his life to the control of the company, . . . rely on the injury itself as entitling him to redress, and leave to the defense the task of presenting exculpatory evidence?" A felon may have placed obstructions on the track, or caused the accident in a manner that no vigilance could guard against; and if so, it may be easily shown by the company. This rule placing the burden on the company is in accord with the doctrine that a common carrier of passengers must exercise the highest degree of care and diligence to prevent injury. Such care as a reasonable and cautious man would use under the circumstances is the diligence required.

This rule, says Hilliard, applies to the vehicle, the horses, the harness, the skill, caution, and sobriety of the driver: 2 Hilliard on Torts, 587.

This court, in the case of *Louisville etc. R. R. Co. v. Ritter*, 85 Ky. 368, recognized the same doctrine, both as to the presumption of negligence and the care required of the carrier.

This case is attempted to be distinguished from that of *Railroad v. Ritter's Administrator*, *supra*, and that class of cases, and cases where the accident, the result of the neglect, might have been caused by the act of a stranger. We see no reason for the distinction. The negligence complained of is that of the company's driver, and that another contributed to the result can make no difference. If the steam-railroad company had not been sued, it would have been a case directly against the other defendant for the negligence of its driver.

Where the direct cause of the injury results from the act of another over whom the carrier has no control, the burden is on the plaintiff, as when the injury is caused by an obstruc-

tion placed on the track of the road by a trespasser, and the alleged negligence is the failure of the company to remove the obstruction within a reasonable time, thereby causing the injury. We decline to follow the case of *Curtis v. Rochester etc. R. R. Co.*, 18 N. Y. 534; 75 Am. Dec. 258.

Another objection is in regard to the fifth instruction given by the court to the jury, to the effect that when the view of the railroad is obstructed, that on approaching the crossing in order to avoid injury, the exercise of greater caution is required by those approaching and those in charge of the train than when the view is clear and unobstructed. The defense asked the court to modify this instruction, or to define the degree of care required in such a case, by telling the jury "that it was not the duty of the driver of the street-car company to stop his train, and go ahead on foot to the crossing to see if a train was approaching, unless he had reasonable grounds to believe a train was approaching." This was refused, and properly, because the court could not, as a matter of law, adjudge that such caution could be dispensed with; and as there was no conductor or other person on the car to exercise this vigilance, the probability of danger imposed this duty on the driver. While a conductor in addition to the driver may not be required on a street-car, still, at such a crossing, a force sufficient should be employed to avoid danger to the passengers.

It was evidently neglect on the part of the steam-railway company, under the circumstances, in failing to provide for the safety of their crossing by removing the obstruction, or in having gates or bars or a flagman to prevent those crossing from being injured by its trains; but the failure to do this did not relieve the street-railway company from the negligence of its employees, and therefore instruction No. 1 was properly refused; and for the additional reason that instructions were given as to the degree of diligence required of the steam-railroad company. This is not an action by the one company against the other, nor is the negligence of the street-car company's driver the negligence of the passenger. The passenger is charging neglect against both. There is certainly a higher degree of care required of a carrier for the security and safety of its passengers than for the security of those not on its train, and therefore the distinction between the instructions given for the plaintiff as against the defendant, in whose care the plaintiff was, and as against the steam-car company for its

concurrent negligence. The doctrine with reference to injuries to those crossing the track of a railway, where the right to cross exists, is, that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country; so what is reasonable care and prudence must depend on the facts of each case. In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required in a crossing in the country, where but few persons passed each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient. This is the general rule laid down by all the works on negligence: Thompson on Negligence, 417; *Lou. Cin. & Lex. R. R. Co. v. Goetz's Adm'x*, 79 Ky. 442; 42 Am. Rep. 227.

The court excluded from the jury the ordinance of the city of Louisville requiring the steam-railroad company to have a flagman at this crossing. It did not appear that the company had notice of the ordinance, and if required to take notice, we cannot well see how the negligence of the steam-railroad company could excuse the neglect of the co-defendant causing this injury. That they were both guilty of neglect is clearly shown, and there is no pretense that the street-car company supposed that this ordinance had been complied with.

We proceed now to consider the objections made by both defendants to the judgment below. During the progress of the trial the appellee, while being examined as a witness, was asked the question, What family have you? The response was, a wife and three children. Objections were interposed to the question by the defendants and overruled. This action was instituted to recover for the gross neglect of the two defendants, and no special damage was alleged other than the fact of the injury, the pain and suffering of the plaintiff, his expenses, loss of time, and permanent injury.

The case was tried in the court below as one for compensation only, and whether under the proof and averments of the petition, his condition with reference to the support of his family should have been embodied in an instruction as one of the elements of damage, is not necessary to be determined. The case was not tried on that theory, and no such instruction given. The court told the jury that if the verdict was for the plaintiff, they should assess such damages, within the amount

claimed, as will reasonably compensate him for his loss of time, necessary expenditures, and for permanent disability or injury, if such be the result, and for the injury sustained by him in his bodily and mental suffering, if any there was, resulting directly from said injuries. This instruction guided the jury plainly as to the compensation or damages the plaintiff was entitled to receive. They were not misled, and doubtless not influenced, by the mere response of the witness to the question that he had a wife and three children.

The cases referred to as rendering such testimony incompetent are where the evidence was excluded, the plaintiff insisting that it was an element of damage, or where the court had permitted the jury to consider it as an element of damage in cases where no special damage to that effect was alleged or punitive damages asked.

Besides the general instruction as to the measure of damages, this special interrogatory was propounded to the jury by the court: "What sum in damages will reasonably compensate the plaintiff for the injuries sustained by him?" The response by the jury was: "We say five thousand dollars." So we think it is apparent that the jury confined their consideration as to the measure of damages to the general instruction given and the special interrogatory propounded by the court. It is argued, however, that the character of the testimony, with reference to the injury inflicted and the damages awarded, shows that the jury, in fixing the damages, was not confined to the instructions given.

The principal surgeon, who dressed the wound, says that it was on the head,—a fracture of the outer plate of the skull. He regarded it as dangerous, and still regards it as such, likely to result in epilepsy or softening of the brain; that the plaintiff was unconscious for several days. After the danger of inflammation disappeared, he left the case in charge of the family physician. He was in attendance on the patient for eight or ten days. The family physician testified that he attended the plaintiff five or six weeks. He was in a comatose condition three or four days; that he suffered a great deal, and required constant attention during his entire illness; that blood discharged from one of his ears; has been called to see him several times since to treat him for severe headache, vomiting, and inflammation of the left ear; that his complaints are attributable to the injury received, and its duration would likely last through life; that plaintiff was a very

healthy man before he received the injury; he attended him three weeks prior to the trial; he was vomiting, and blood oozing from his ear; the general result in cases of this kind is weakness of mind or epilepsy. Dr. Larrabee was then recalled, and stated that the symptoms stated by the family physician rendered the probability of epilepsy stronger. These statements, made by skilled surgeons and physicians, uncontradicted by any proof in the record, was the testimony upon which this verdict was based, and if true, — and there is no reason for doubting them, — the verdict of the jury is fully sustained by the evidence; and looking to the general and special instructions on the question of damages, we are satisfied the response merely to the question propounded, that he had a wife and three children, did not enhance the damages or prejudice the substantial rights of the parties.

The next question arises as to the special findings by which the jury required the one defendant to pay of the damages sustained two thousand dollars, and the other three thousand dollars. The jury had said that the plaintiff was entitled to recover five thousand dollars, and if, as is maintained by counsel for both defendants, they had no right to apportion this sum between the wrong-doers, then the reversal, if had, would only require the court below to enter a joint judgment for the five thousand dollars, the whole of which might be recovered of one, with no right of contribution against the other. It is urged, however, by the Central Passenger company, that the judgment requires it to pay one thousand dollars more than the Louisville and Nashville Railroad Company, and the court having no right to enter such a judgment, it should be reversed. Without determining its effect upon the substantial rights of the parties in the event the damages could not be severed, and such was the common-law rule on the subject, we will proceed to determine the question made as to the act of 1839. That act provides: "That in actions of trespass it shall be lawful for the jury to assess several or joint damages against the several defendants, and when the jury find several damages, the judgment shall be in favor of the plaintiff, against each defendant, for the several damages, and a joint judgment for costs."

This act, which has been held to apply to all kinds of trespasses, and that modifies the rule of the common law, and is more a question of practice than of right, has not been repealed, expressly or by implication, by either the Revised or

General Statutes, or by the Code of Practice. There is no provision of the Code of Practice with regard to the remedy in conflict or inconsistent with the provisions of the act of 1839, nor any provision of the General Statutes in conflict with or inconsistent with its provisions or title that treats of this subject.

This statute affords a remedy against all joint trespassers, with the right on the part of the jury to punish the wrongdoer to the extent of his participation in the wrongful act; and if one is the more guilty than the other, to punish him the more severely. It is an equitable statute, and in this case it is exemplified by punishing the one more severely whose duty it was to stop until the train passed, and who could have avoided the danger by the exercise of the slightest care.

We are the less reluctant to recognize the validity of the act of 1839, as it in no manner affects the rights of these parties, as a reversal because of the damages being severed would only result in directing a joint judgment against the two defendants for the real amount of damages assessed: *Ferguson v. Terry*, 1 B. Mon. 96; *Henry v. Sennett*, 3 Id. 311; *Cox v. Cooke*, 1 J. J. Marsh. 360; *Rochester v. Anderson*, 1 Bibb, 439.

Judgment affirmed.

RAILROAD COMPANY, DUTY OF, TO KEEP FLAGMAN AT ROAD CROSSING: *McGrath v. New York etc. R. R. Co.*, 59 N. Y. 468; 17 Am. Rep. 359, and note 363; *Ernst v. Hudson etc. R. R. Co.*, 39 N. Y. 61; 100 Am. Dec. 406, and note 412; compare *Welch v. Hannibal etc. R. R. Co.*, 72 Mo. 451; 37 Am. Rep. 440.

DEGREE OF CARE REQUIRED TO BE EXERCISED BY STREET-RAILWAY COMPANIES in running their cars: *Topeka City R'y Co. v. Higge*, 38 Kan. 375; 5 Am. St. Rep. 754, and note 766; *Nichols v. Sixth Avenue R. R. Co.*, 38 N. Y. 131; 97 Am. Dec. 780; *Mangan v. Brooklyn R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66. Where passenger in horse-car is injured by carelessness of engineer of railroad company in the management of his locomotive, it is no defense to show contributory negligence in the driver of the horse-car: *Bennett v. Railroad Co.*, 36 N. J. L. 225; 13 Am. Rep. 435.

DAMAGES FOR PERSONAL INJURY CAUSED BY DEFENDANT'S NEGLIGENCE, ELEMENTS OF: *Alabama Great Southern R. R. Co. v. Yarbrough*, 83 Ala. 233; 3 Am. St. Rep. 715, and cases collected in note 718.

IN ACTION OF TRESPASS AGAINST SEVERAL DEFENDANTS, JURY CANNOT assess damages severally against them: *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

TURNER v. SHAW.

[98 MISSOURI, 22.]

DEEDS — REFORMATION. — EVIDENCE must be clear, positive, and convincing in order to so reform a deed as to include therein land claimed to have been omitted by mistake.

DEED DIRECTLY FROM HUSBAND TO WIFE, or from the latter to the former, vests the equitable title in her or him in equity, though such deed is void at law.

DEED DIRECTLY FROM HUSBAND TO WIFE, with an *habendum* clause to have and to hold to her sole use and benefit, vests an equitable separate estate in her as against him, though a different result might have been reached had the deed been made by a stranger.

WIFE'S SEPARATE ESTATE, CONVEYANCE OF. — Wife has absolute ownership of, and may convey or encumber, her equitable separate estate without her husband joining her in the conveyance.

WHERE WIFE HAS CONVEYED HER EQUITABLE SEPARATE ESTATE to her husband, he may dispose of it by will as he sees fit.

W. H. Morrow, and T. J. C. Fagg, for the appellant.

John Matson, for the respondent.

SHERWOOD, J. Ejectment for an undivided one-sixth part of lots 519 and 520, in block 65, in the city of Louisiana, Pike County, Missouri.

The plaintiff and defendant are brother and sister, children and heirs at law of their father and mother, John F. and Sarah Ann Turner. The answer was a general denial, with a statement of special matters of defense set out at length, alleging that John F. Turner, deceased, the common source of

title, being a southern sympathizer, and alarmed at the condition of the country, in June, 1861, executed a deed of conveyance to the property in question to his wife, Sarah Ann Turner. This deed was recorded in 1865. John F. Turner, with his family, consisting of his said wife and two daughters, Mary J. Shaw and Sallie Turner, continued in the uninterrupted possession of the property up to the date of his death, in 1880. The wife died in 1882. The defendant, Mary J. Shaw, widowed sister of the plaintiff, was the housekeeper and general manager of the household from the time of the acquisition of the property in 1852, until the death of her mother, Mrs. Sarah Ann Turner, in 1882; that on account of his fears for the safety of himself and property, and for the purpose of placing all his property in such a condition that his family might have full benefit of it in case of his death or its confiscation, on June 5, 1861, in consideration of "love and respect" for his said wife, he conveyed to her all of his property, consisting of several tracts of land, together with the lots in question, which were occupied as his homestead. In September, 1874, the wife, Sarah Ann Turner, in consideration of the sum of five dollars, etc., reconveyed the same property to her husband.

In August, 1878, being advised that the last-named conveyance was ineffectual to reinvest him with the legal title to the property so as to enable him to make a proper disposition of his entire estate among his children, and especially to secure to his two daughters aforesaid the property in dispute for a permanent home for them, he and his said wife executed a deed to the said Mary J. Shaw, by which they intended to convey all of his property, including these two lots; that on the same day, Mary J. Shaw executed her deed to her father for the same property, following the description of the last-mentioned deed. In both of these conveyances lots 519 and 520, in block 65, were omitted by the mistake of the scrivener. October 25, 1878, John F. Turner made his last will, devising these two lots to his said daughters, subject to the life estate of his wife, Sarah Ann Turner.

Sallie Turner afterwards conveyed her interest to her sister, Mary J. Shaw. It is alleged that John F. Turner in his lifetime had given to the plaintiff, by way of advancement, money and property largely in excess of his distributive share in the estate, and that Mrs. Sarah Ann Turner, at all times, up to the date of her death, assented to the pro-

priety of making such a disposition of the property as to secure this home to the two daughters, and did all that was deemed necessary to accomplish that end. These allegations of the answer concluded by praying for such reformation of the deeds of 1878 as to include the lots aforesaid. Except denying that the plaintiff was the brother of the defendant, the reply was a general denial. The court found and gave judgment for the plaintiff.

1. This case was heard and determined solely upon the theory of the special defense set forth in the answer, that defendant was entitled to have the deeds of 1878 so reformed as to have included therein the lots in controversy. After an examination of the evidence, I am satisfied that it is not sufficient to warrant a decree for the reformation of those deeds. In order to reach such a standard of probative efficacy, the evidence must be clear and positive and convincing: *Modrell v. Riddle*, 82 Mo. 31, and cases cited. Or, as Judge Story puts it, "entirely satisfactory, and equivalent to an admission": 1 Story's Eq. Jur., 13th ed., sec. 156. There is, therefore, no fault to find with the action of the lower court in this view and on this theory of the case.

2. But there is another aspect in which this case is to be regarded, one which appears to have escaped the attention of both court and counsel; it is this: The deed from a husband to a wife, or from the latter to the former, are null in law, this arising from their being regarded as one person. Very differently, however, are they regarded in a court of equity. There they may sue and be sued, contract and be contracted with, become the debtor or creditor of each other with like effect, so far as regards equitable contemplation and rights, as if they twain had never become one flesh: *Morrison v. Thistle*, 67 Mo. 596, and cases cited; 1 Bishop on Married Women, secs. 35, 37, 713, 717. The deed of 1861, from John F. Turner to his wife, while it did not vest in her a legal title to the lots in litigation, still passed to her an equitable estate.

3. And the estate thus created in the wife was an equitable separate estate. This is apparent for two reasons: 1. Because the language of the *habendum* of the deed last mentioned is: "To have and to hold unto the said Sarah Ann Turner, and to her sole use and benefit": *Morrison v. Thistle*, *supra*; 2. Because the deed was made directly from the husband to the wife. If the deed had been made by a stranger to the wife, then a separate estate in her would not have been created, absent the

necessary words; but being made to the wife by the husband, a separate estate as against him was the result: *Deming v. Williams*, 26 Conn. 226; 68 Am. Dec. 386; *Huber v. Huber*, 10 Ohio, 371; *Steel v. Steel*, 1 Ired. Eq. 452; *Maraman v. Maraman*, 4 Met. (Ky.) 84; *McWilliams v. Ramsay*, 23 Ala. 813; 1 Bishop on Married Women, sec. 838.

4. It being, then, established that, in consequence of the deed of 1861, the wife became the owner of an equitable separate estate in the land thereby conveyed, what was the effect of her deed made back again to her husband in 1874? I can regard it as having but one effect, and that was, to convey to him the same lands—that is, her equitable estate therein—which prior thereto she had been the recipient of from him. This must have been the effect of the deed of 1874, or else it had no effect at all. But it may be urged that this deed was utterly invalid, because it was executed by the wife alone. However this may be as to mere statutory estates, which require a joinder of husband and wife in order to their valid execution, it will not hold as to separate estates in equity, which the wife may charge, mortgage, or convey, without let or hindrance from her husband. With regard to such property, she is, in equity, a *feme sole*, and has the *jus disponendi*, which is the inseparable incident of ownership. By virtue of this, she charges, she encumbers, or she absolutely disposes of it, or she binds it by her parol agreements, just as any other owner would. This position is sustained by abundant authority, both here and elsewhere: *Livingston v. Livingston*, 2 Johns. Ch. 537; *Whitesides v. Cannon*, 23 Mo. 457; *King v. Mittalberger*, 50 Id. 182; *McQuie v. Peay*, 58 Id. 56; *Claflin v. Van Wagoner*, 32 Id. 252; *Schafroth v. Ambbs*, 46 Id. 114; *Kimm v. Weippert*, 46 Id. 532; 2 Am. Rep. 541; *Lincoln v. Rowe*, 51 Mo. 571; *De Baun v. Van Wagoner*, 56 Id. 347; *Gag v. Ihm*, 69 Id. 584; 1 Bishop on Married Women, sec. 853; 2 Id., sec. 163; *Taylor v. Meads*, 34 L. J., N. S., 203.

It is upon the idea that a *feme covert*, possessed of a separate estate, may convey it, that gave origin, in the conveyances creating such estates, to clauses against alienation: 1 Bishop on Married Women, sec. 844. Such clauses, the invention of Lord Thurlow, amount to a constant assertion of the power which the *feme* possesses but for such prohibitions. These views are contrary to those expressed in *Martin v. Colburn*, 38 Mo. 229; but the opinion there was by a divided court, and satisfied now that it was erroneous, we all agree to overrule that case.

5. The husband being the possessor of the legal estate in the lots in question, and having received from his wife all the equitable estate which, by his deed of 1861, he had conveyed to her, it results that, at the time he made his will, he had full power and ownership to dispose of the lots as he would, and that no reformation of the deeds of 1878 was necessary.

We reverse the judgment, and remand the cause, with directions to enter judgment for defendant.

DEED FROM WIFE TO HUSBAND. — The established doctrine of the common law, that in consequence of the unity of person between husband and wife, neither can grant to the other an estate in possession, reversion, or remainder, to take effect in possession during the lifetime of the grantor, has been so far modified by courts of equity recognizing the right of the wife to contract in respect to her equitable separate estate, and so nearly eliminated by our statutes giving to married women greatly enlarged rights and privileges in regard to their separate estate, and recognizing their separate legal existence to such a considerable extent, that the old rule may be safely said to have ceased to exist at all, or if it does exist, to have lost its common-law identity altogether.

The right of the wife to control and dispose of her separate estate is regulated by statute in nearly every state in the Union, as shown by the extended note to *Kirkpatrick v. Buford*, 76 Am. Dec. 367-401, treating of the subject of the "separate property of the wife as affected by American statutes"; and in those states where she is given the right to convey her separate property as if "sole" or "unmarried," or as "any other person," without the consent of her husband, or without his joining in the conveyance, no good reason is seen why she may not convey directly to him, in the absence of fraud, actual or presumed, especially if the deed or conveyance is based upon a good or valuable consideration. The equitable right of the wife to convey her property has long been recognized in equity, and Mr. Story says: "A married woman having this general power of disposing of her separate property, the question naturally arises, whether she may bestow it by appointment or otherwise upon her husband, or whether the legal disability attaches to such a transaction. Upon this subject the doctrine is now firmly established in equity, that she may bestow her separate property by appointment or otherwise upon her husband as well as upon a stranger; but at the same time courts of equity examine every such transaction between husband and wife with an anxious watchfulness and caution and dread of undue influence, and if they are required to give sanction or effect to it, they will examine the wife in court, and adopt other precautions to ascertain her unbiased will and wishes. Courts of equity will not only sanction such a disposition of the wife's separate property in favor of her husband when already made, but they will also, in proper cases, upon her application and consent given in court, decree such property to be passed to her husband, whether it be in possession or reversion, in such manner as she shall prescribe": 2 Story's Eq. Jur., 13th ed., secs. 1395, 1396; *Scarborough v. Watkins*, 9 B. Mon. 540; 50 Am. Dec. 528; *Darlington's Appeal*, 86 Pa. St. 512, 27 Am. Rep. 726, where it is said that the conveyance of a wife's estate to her husband's use will be declared void, unless it affirmatively appears from the attending circumstances, or otherwise, that it was her voluntary act, and not induced by undue influence on the part of her husband.

The power of the wife to convey her real estate to her husband through the medium of some third person is so universally exercised, that it is seldom, if ever, now questioned. Thus a conveyance by husband and wife of realty belonging to her to a third person, and a reconveyance of the same estate by such third person to the husband, with intent to vest the title in the latter, when the freedom of the wife in the transaction and her capacity are unquestioned, will vest in the husband a valid title to the property granted: *Dempsey v. Tyler*, 3 Duer, 73; *Jasper v. Maxwell*, 1 Dev. Eq. 357; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Cruger v. Douglas*, 4 Edw. Ch. 433; *Garvin v. Ingram*, 10 Rich. Eq. 130; *Durant v. Richie*, 4 Mason, 45. In the absence of proof of coercion, undue influence, or fraud by the husband against the wife, the validity of such transactions is never questioned: *Todd's Heirs v. Wickliffe*, 18 B. Mon. 867, following *Scarborough v. Watkins*, 9 Id. 540; 50 Am. Dec. 528; *Shepperson v. Shepperson*, 2 Gratt. 501. Still, it has been held, where a father married his step-daughter, and afterward she conveyed to her supposed husband all her property for a nominal consideration, acknowledging the deed as a *feme sole*, and was described as "H. A. M.," otherwise called "H. A. B." (her maiden name), and on the following day she united with her husband in a deed of the same property to a third person, who on the next day reconveyed to the husband, that all of the deeds were fraudulent and void: *McClellan v. Kennedy*, 3 Md. Ch. 234.

Whether, under the statutes enlarging the rights of married women as to their separate property, or independently thereof, she has the right to convey such property directly to her husband, there is some conflict in the authorities. Thus in New York, it is held that under the statute the disability of the husband to take land by conveyance from the wife remains the same as before the statute was passed, and that a voluntary conveyance of land by the wife to the husband is wholly ineffectual: *Winans v. Peebles*, 32 N. Y. 423; 31 Barb. 371. Though the statute enables her to convey or devise her land as if she were unmarried, still her deed to her husband in contemplation of her death, made in good faith and voluntarily, is ineffectual: *White v. Wager*, 25 N. Y. 328; 32 Barb. 250. So in Maryland, it is held that a deed from a married woman of her separate estate directly to her husband is null and void: *Preston v. Fryer*, 38 Md. 221; and the only method she can adopt to convey to him, the statute requiring the joint signature of both to the deed, except in the execution of a power, is by means of a conveyance to a third person for his use, he joining his wife in the deed: *Gebb v. Rose*, 40 Id. 387. In Indiana, it is held that a deed by the wife conveying her land directly to her husband, based on the consideration of love and affection and five dollars, and signed by the wife alone, is ineffectual to pass any interest in the land, and is null and void. In this state, the statute requires the husband to join the wife in a conveyance of her separate estate: *Lunts v. Greve*, 102 Ind. 173. In Arkansas, the wife may, by deed, convey her property without her husband joining her in the conveyance. Still, her executory contract to convey her separate property to her husband, if not a nullity, is at least voidable at her election. A man, in consideration of his intended marriage, conveyed to his proposed wife certain land to hold to her own and separate use, with full power to convey as if she were *sole*, and after the marriage and a separation she contracted for the sale of the land to him, and executed a bond to give title upon the payment of the purchase-money. He failed to pay, and the wife conveyed to a third party, and in ejectment by him it was held that the bond for title given to the husband, if not void, was voidable at her elec-

tion, and that the interest of the husband was swept away by the deed to the third party: *Mihoe v. Mihoe*, 44 Ark. 115. In Georgia, the statutes forbid a sale of her separate property by the wife to the husband, but she may make him a gift of the same: *Cain v. Ligon*, 71 Ga. 692; 51 Am. Rep. 281. In Illinois, it is held that a married woman's trust estate, as a settlement to her separate use, can only be conveyed by her in the manner directed in the deed creating the trust. Therefore a deed by a wife and her trustee to her husband, of land conveyed by her to the trustee before marriage, is void as a conveyance, and as a power of appointment, if not attested by three or more credible witnesses, as required in the conveyance to the trustee, reserving the power of disposition by the wife, and equity will not aid the defective execution of such power in favor of the husband: *Brett v. Yeaton*, 101 Ill. 242.

In some of the states, it is held that the wife may deed her separate property, consisting of land, directly to her husband. Such is the law of Maine under the Revised Statutes of 1871, chapter 61, section 1: *Savage v. Savage*, 80 Me. 472; as well as under the statute of 1852: *Allen v. Hooper*, 50 Id. 371. So under section 2215 of the Revised Statutes of Iowa, the wife may convey directly to her husband, without the intervention of a trustee, an interest in lands held as her separate estate. Thus a conveyance by a wife to her husband, executed under an agreement of separation, relinquishing her right of dower, and releasing all claim upon him for future maintenance and support, will be upheld when supported by a sufficient consideration, and no fraud, deception, or oppression is practiced upon her: *Robertson v. Robertson*, 25 Iowa, 350. And so other cases are found where absolute deeds of her property by the wife directly to the husband have been upheld where the consideration expressed was sufficient and valuable: *Booker v. Booker*, 23 Ala. 473; *Grain v. Shipman*, 45 Conn. 572. But when the wife seeks thus to convey her property directly to her husband, she must follow the mode provided by the statute: *Sims v. Ray*, 96 N. C. 87. When the husband obtains the wife's property under the form of a purchase, attended by suspicious circumstances and strong evidence of fraud, for a merely nominal consideration, he is bound to prove his good faith by clear and satisfactory proof, or it will be presumed that he made improper use of his influence: *Stiles v. Stiles*, 14 Mich. 72. If a wife seeks to set aside such a conveyance, the same full and positive showing of fraud or duress is not required as would be as against a stranger: *Witbeck v. Witbeck*, 25 Id. 439. But even in those states where, under the statute, a voluntary conveyance of land by the wife to the husband is void, the validity of such deed may be established by the application of principles of equity, where a consideration has been paid: *Winans v. Peebles*, 32 N. Y. 423. And in *Wormely v. Wormely*, 98 Ill. 544, where the husband purchased land, and had the title made to his wife, under an agreement on her part that she would reconvey to him when requested to do so, it was held that such contract, on the part of the wife, was of such nature that it could be enforced in equity at the suit of the husband.

TO REFORM DEED ON GROUND OF MISTAKE, the proof must be clear, positive, and convincing: *Ruffner v. McConnell*, 17 Ill. 212; 63 Am. Dec. 362, note 365; *Sawyer v. Hovey*, 3 Allen, 331; 81 Am. Dec. 659, note 661; *Hutchinson v. Ainsworth*, 73 Cal. 452; 2 Am. St. Rep. 823; *Kornegay v. Everett*, 99 N. C. 30.

MARRIED WOMAN MAY CONVEY OR ENCUMBER her equitable separate estate: *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478, note 498; *Lindley*

v. Cross, 31 Ind. 106; 99 Am. Dec. 610, note 614; *Elliott v. Gower*, 12 R. I. 79; 34 Am. Rep. 600; *Smith v. Thompson*, 2 McAr. 291; 29 Am. Rep. 621.

HUSBAND AND WIFE. — A GIFT FROM HUSBAND TO WIFE DIRECTLY, OR BY CONVEYANCE to her in payment of an admitted indebtedness, passes only an equitable estate or interest, leaving the legal title in the husband: *Bush v. Henry*, 85 Ala. 605. A note executed upon a valid consideration by husband to wife during coverture, though void by strict rules of law, will be enforced in equity against the husband or his estate as a declaration of trust in favor of the wife: *Templeton v. Brown*, 86 Tenn. 50.

KENDALL v. POWERS.

[96 MISSOURI, 142.]

HOMESTEAD. — HUSBAND, AS HEAD OF FAMILY, may have a homestead exempt from execution in a life estate, or in property the title to which is in his wife.

HOMESTEAD — CONVEYANCE OF. — While a party holds property exempt from sale under execution as a homestead, he may sell his interest therein; and the purchaser will take whatever title he has, free from any claim of a judgment creditor.

A. W. Williams, for the appellants.

J. B. Wilcox, for the respondent.

BLACK, J. This suit of ejectment was commenced on the 14th of November, 1884, to recover the possession of several lots in the town of Linneus, containing in all about an acre and a half of land, and valued at five hundred or six hundred dollars.

The facts are these: On the 31st of December, 1881, the plaintiffs obtained a judgment against C. G. Cummins for \$787.09, under which the property was sold on execution and purchased by the plaintiffs on the 12th of June, 1884. At the date of the judgment, Cummins had a wife and six children. He then, and for a long time previous thereto, resided on the property. On the 22d of November, 1881, a few days before the date of the judgment, he and his wife conveyed the property to Crampton, who, at the same time, conveyed it back to Mrs. Cummins, and she died on the same day. In March, 1884, Cummins and his second wife conveyed the property to the defendant, and at the same time, Cummins, as curator of his children, conveyed, or attempted to convey, their interest in the property to defendant. There is evidence tending to show that these deeds were made as a security for money loaned Cummins; other evidence is to the effect that

the transaction was an out-and-out sale, with a right on the part of Cummins to repurchase the property, if he desired to do so.

A few days after the execution of these last-mentioned deeds, Cummins, with his family, went to the state of Kansas, returning in December, 1884. There is evidence that he left with the intention of returning, as he did. He repurchased the property, and took possession after the commencement of this suit.

The plaintiffs do not seek to avoid the deeds, or any of them, for fraud or otherwise; but they insist that, after the death of Mrs. Cummins, her husband had an estate by the curtesy in the property, and that the lien of the judgment attached to that estate. The deed to Crampton, and from him to Mrs. Cummins, simply vested the title in her. Mr. Cummins was all the while the head of a family, and he continued to reside with his family in the property until a few days after the sale to the defendant, and the property was his homestead during all that time. The law exempts from execution and attachment the homestead of every housekeeper or head of a family. The husband, as the head of a family, may have a homestead in a life estate, or in property the title to which is in the wife: Thompson on Homesteads, sec. 220. It was the same homestead all the while. The exemption is in no way affected by the fact that during the time Cummins occupied the property with his family, the title became vested in his wife, nor by the fact that, upon the death of his wife, he became entitled to an estate by the curtesy. Whether the debtor owns the fee, or has but a marital in the property, or a life estate, is a matter of no concern to the creditors, the debtor being the head of a family, and the property his homestead. Be the interest whatever it may, it is exempted from sale under execution.

While the property stood exempt from sale under execution, Cummins could sell his interest therein; and the purchaser would take whatever title he had, free from any claim of the judgment creditor: *Davis v. Land*, 88 Mo. 436.

What has been said disposes of all the questions raised in this court. The judgment is, therefore, affirmed.

HUSBAND MAY HAVE HOMESTEAD IN LIFE ESTATE or in an estate held by curtesy: Note to *Prior v. Stone*, 70 Am. Dec. 344; see also *Spencer v. Geissman*, 37 Cal. 96; 99 Am. Dec. 248, note 250.

HOMESTEAD IS GENERALLY NOT SUBJECT TO JUDGMENT LIENS so as to prevent its alienation: *Ketchin v. McCorley*, 26 S. C. 1; 4 Am. St. Rep. 674; note 687; *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 48, note 53, 54; *Simpson v. Houston*, 97 N. C. 344. The exemption from sale under execution against a homesteader follows the land when conveyed by him to another party: *Simpson v. Houston*, *supra*. The judgment against a resident householder whose entire property, real and personal, is less than the amount allowed as exempt from execution, does not become a lien upon the realty of judgment defendant, and a purchaser from the latter takes it exempt from execution: *Dumbald v. Rowley*, 113 Ind. 353.

CARR v. LEWIS COAL COMPANY.

[96 MISSOURI, 149.]

PLEADING AND PRACTICE — AGREED STATEMENT OF FACTS. — Determination of a case upon an agreed statement of facts is, in effect, a special verdict, and the court pronounces judgment upon such facts precisely as if the jury had found a verdict in that form. Hence, if there is any ambiguity, any omission of facts necessary to a recovery, any lack of clearness and certainty on material points, the judgment will not be allowed to stand.

JUDGMENT — JURISDICTION. — In order to subject particular property to the judgment of a court, the suit brought for that purpose must be brought where the *res* is.

LIS PENDENS — BONA FIDE PURCHASER OF PERSONAL PROPERTY. — Where movable personal property pending litigation against it is removed from the jurisdiction where the suit is pending to another state, and there sold to a *bona fide* purchaser, the doctrine of *lis pendens* does not apply to the sale; and applying this rule, a steam-tug is not subject to the law of *lis pendens* after its removal from the state.

JUDGMENT — PURCHASER PENDENTE LITE. — Personal judgment cannot be rendered against a mere *bona fide* purchaser *pendente lite*, although such judgment might be authorized against his fraudulent donee or grantee.

H. D. Wood and James Taussig, for the appellant.

Given, Campbell, and Joseph Dickson, for the respondent.

SHERWOOD, J. In 1877, Carr brought suit in the St. Louis circuit court against Thomas Parker, Sen., upon a note, and recovered judgment. Execution was issued and levied upon the steam-tug now in controversy, called the Alice Parker, as the property of Thomas Parker, Sen.; but Thomas Parker, Jr., in whose name the boat was fraudulently registered as owner, claimed the boat, and Carr not being able to give an indemnification bond to the sheriff, the levy was released. This was in 1878, and the cause was numbered 43,734. In 1879 Carr filed his petition in said court against the Parkers, to set aside the conveyance of the father to the son as fraudulent, and was

successful, a decree, as prayed, being entered February 18, 1880. This cause was numbered 49,832.

Prior to the entering of this decree, however, and on January 8, 1880, the Lewis Coal Company, having no actual notice of the suit, bought the tug of Thomas Parker, Jr., paid him its full value, five thousand eight hundred dollars, in cash, and immediately took possession of her. Upon the entry of the decree aforesaid, an order was issued directing that defendant Thomas Parker, Jr., deliver the tug Alice Parker to the sheriff, and that upon receiving it the sheriff sell the tug. The sheriff made return upon this order to the effect that Thomas Parker, Jr., refused to deliver the tug, saying it was not in his possession or under his control. No bond was given in the proceeding, and although in the petition a restraining order was asked to enjoin the Parkers from disposing of the tug, none was granted until final decree. It is admitted that the Lewis Coal Company is a corporation; but whether foreign or domestic, or where its place of business is, or at what place the tug was bought, or where it has been since, or was at the time the decree was entered, nowhere appears.

The present proceeding, in the nature of a supplemental bill, was instituted to reach and subject to the satisfaction of the judgment aforesaid the steam-tug, as having been sold *pendente lite*, and the Lewis Coal Company was made a party defendant; subsequently a dismissal was entered as to the Parkers. Upon the hearing of this last-named cause, the court found the issues for the plaintiff, and entered a decree against the Lewis Coal Company, as follows: "That plaintiff recover his costs of defendant; that the total amount of judgment and costs in cases No. 43,734 and No. 49,832—that is, the original suit against Parker, Sen., and the creditors' bill against father and son—are a lien on the interest of the Lewis Canal Company in the tug-boat Alice Parker, on the 6th of September, 1880; that the Lewis Coal Company forthwith deliver the boat to the sheriff; that the sheriff forthwith proceed to sell the same, for cash, in the manner provided for execution sales; that out of the proceeds the sheriff pay the costs of this suit, and the costs of the cases 43,734 and 49,832, and then pay to plaintiff his judgment in 43,734, with interest, and pay the remainder to the Lewis Coal Company. And in the event said tug-boat be not delivered to said sheriff within five days after demand by him therefor of defendant pursuant to this decree, then defendant shall pay to

said plaintiff the said amount of said judgment, with interest and costs, in said cases numbered 43,734 and 49,832 of this court, hereinbefore adjudged a lien against said tug-boat, and said sheriff shall thereupon proceed forthwith to collect the said amount thereof, as well as the costs of this suit, of said defendant, by levy upon the goods, chattels, and real estate of said defendant or otherwise, in conformity to law, in like manner as upon general *fiery facias*; and that plaintiff have execution and such other final process as may be necessary and proper to carry into full effect this decree."

This decree was reversed in the court of appeals (15 Mo. App. 551), and the plaintiff has appealed here. The judgment of reversal was based upon two grounds,—one as to jurisdiction, and the other as to the scope of and nature of the decree. As to the first, the agreed statement of facts in this cause, upon which it was determined, occupies the same footing and stands in lieu of a special verdict, and the court pronounces its conclusions upon such agreed facts precisely as if a jury had found a verdict in that form. Hence, if there be any ambiguity, any omission of facts necessary to a recovery, any lack of clearness and certainty on material points, the judgment cannot be allowed to stand: *Gage v. Gates*, 62 Mo. 412; *Munford v. Wilson*, 15 Id. 540; *Lecompte v. Wash*, 9 Id. 547.

In this case, as before noted, it does not appear where the tug—the *res* which the plaintiff seeks to subject to the satisfaction of his judgment—was when defendant bought it, nor where it was at the time the last decree was rendered. In other words, no jurisdiction of the court appears to have existed over the tug at the time of the entry of either of the decrees. As a general rule, to which this case forms no exception, it is needless to say that in order directly to subject particular property to the judgment or decree of any court, the suit brought for that purpose must be brought where the thing is: *Wells on Jurisdiction*, sec. 117; *La Trobe v. Hayward*, 13 Fla. 190; *Austin v. Bodley*, 4 T. B. Mon. 434; *Story's Conflict of Laws*, sec. 539; *Carrington v. Brents*, 1 McLean, 167.

If it be conceded, in accordance with the ruling of the lower court as well as that of the court of appeals, that the property in question is of that nature as would form the subject of a *lis pendens*, still it does not appear where the property was at the time it was sold to the defendant, nor at any

time since. One of the bases suggested for the doctrine as to the force and effect of a pending suit is that stated by an eminent writer: "For it is presumed that legal proceedings, during their continuance, are publicly known throughout the realm": Adams's Eq. 157. By this term "realm" is meant the state or sovereignty where the property is, as is explained in a note by the writer just cited; and the term "the whole world" he also explains as simply meaning "all men in that jurisdiction or state." The true basis of the doctrine of *lis pendens* is that of an imperious public policy and necessity which will not admit the judgments or decrees of courts to be frustrated or set at naught by transfers, which, if sanctioned, would render litigation interminable, and thus defeat the ends of justice: Freeman on Judgments, sec. 191, and cases cited; *Newman v. Chapman*, 2 Rand. 93; 14 Am. Dec. 766, and note.

But a *lis pendens* should not have any force or operation beyond the boundaries of the state where the suit is pending. To thus extend its operation would certainly be giving the judgments and decrees of courts an extraterritorial effect, in violation of the familiar maxim, *Extra territorium jus dicenti impune non paretur*: Story's Conflict of Laws, sec. 539. "No sovereignty can extend its process beyond its territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals": *Picquet v. Swan*, 5 Mason, 35, and cases cited.

If the process itself cannot be extended or be served beyond the territorial limits of the sovereignty whence issued, certainly a mere incident of the service of such process, as is a *lis pendens*, can have no greater force or further-reaching operation. The principle of the rule being discussed is the prevention of the judgments and decrees of courts from being frustrated by transfers whilst matters are yet *in fieri*, and thus balking such judgments and decrees of their customary operation after they are rendered. But where can such obstructions be cast in the way of such adjudications? Obviously, only in the sovereignty where the adjudications are had. If the property be eloigned, taken beyond the confines of the jurisdiction where litigation is in progress, to say that it shall bear with it, no matter where taken, the effects and consequences of previous litigation, and conclusively bind any

purchaser, however innocent of wrong, though the property has no history or ear-marks of litigious strife about it, would be carrying the doctrine of *lis pendens*—a harsh doctrine at best, and one not favored by the courts, as all the authorities agree—to a most extraordinary and pernicious length. These views find support in the case of *Shelton v. Johnson*, 4 Sneed, 672; 70 Am. Dec. 265; see also *Powell v. Williams*, 48 Id. 108; 1 Story's Eq. Jur., 13th ed., sec. 405; *Thoms v. Southard*, 26 Am. Dec. 467.

Of course, these remarks are limited to a case where personal property of a movable nature is, pending litigation concerning it, withdrawn from the jurisdiction where such litigation is pending to another state, and there sold to a *bona fide* purchaser. It is a very harsh presumption and rule which force the citizens within the same state to take notice at their peril of all matters being adjudicated within its borders,—a rule only justified by imperative necessity; but to say its operation shall be extended to every portion of the United States would be a very startling extension of a rule already sufficiently odious and oppressive; e. g., would it not be preposterous that a suit brought in a territorial court of Alaska, to subject a ship to a lien, should prevent the valid transfer of such ship when subsequently found sailing off the coast of Maine? This question furnishes its own answer.

Nor do I see that article 4, section 1, of the federal constitution, as to full faith and credit, etc., being given to the records and judicial proceedings, etc., has any bearing upon the point whether a *lis pendens* in one state shall have any extra-territorial effect. The obvious meaning of that provision goes only to the operation such records shall have when complete and subsequently offered in evidence, as establishing that certain facts have been adjudicated, and has no reference as to what shall be the incidental effect of a suit which results in such records being made.

As to whether the steam-tug in question belongs to that class of property which may be the basis of a *lis pendens*, I incline to think that it does. This point was so ruled as to a steamboat in *Thoms v. Southard*, *supra*. Treating of this matter, a writer already cited observes: "Every consideration of necessity and of public policy which demands and justifies the law of *lis pendens*, as applied to real estate, also demands and justifies the application of the same law to personal property. In fact, the ease with which personalty could be trans-

ferred to parties having no notice of the litigation is much greater than in the case of real estate. The probability of the defendant's entirely defeating the object of the suit by a transfer of the property *pendente lite* is rather greater in the case of personal than of real estate; and the necessity of some law prohibiting such transfer, to the prejudice of the prevailing party, is, therefore, greater in the former case than in the latter. But the necessity of preserving the negotiable character of negotiable paper not due, so as to require no inquiry beyond inspection of the paper itself, in relation to its ownership, has properly been considered paramount to the necessity of avoiding transfers *pendente lite*; and that class of paper, therefore, is the only property not liable to be affected by the doctrine of *lis pendens*": Freeman on Judgments, sec. 194, and cases cited. And it is thought that section 4192, Revised Statutes of the United States, or its associate sections, as to the registry of vessels, has no effect on the doctrine just discussed.

Now as to whether the decree which the lower court entered was a correct one, conceding that court had jurisdiction over the *res* in controversy. Such decrees or judgments are possibly authorized against the fraudulent donees or grantees of property: *Murtha v. Curley*, 90 N. Y. 372; *Ferguson v. Hillman*, 55 Wis. 181; *Kramer v. McCaughey*, 11 Mo. App. 426; *Clements v. Moore*, 6 Wall. 312. But I find no sanction in the authorities for such a decree against a mere purchaser *pendente lite*, holding him liable to respond to the plaintiff in the action in a personal judgment. In *Murray v. Ballou*, 1 Johns. Ch. 565, the leading case on this subject, the chancellor, while he decreed that such a purchaser should pay the amount of the consideration which he was to pay for the land, yet declined to tax him with costs.

These considerations induce an affirmance of the judgment of the St. Louis court of appeals, and it is so ordered.

JUDGMENTS WITHOUT JURISDICTION OF THE PERSON OR THE SUBJECT-MATTER ARE VOID: *Brickhouse v. Sutton*, 99 N. C. 103; 6 Am. St. Rep. 497, and note 502; *Adams v. Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448, and note 455; *Yentzer v. Thayer*, 10 Col. 63; 3 Am. St. Rep. 563; *Dobbins v. McNamara*, 113 Ind. 54; 3 Am. St. Rep. 626; *Hahn v. Kelley*, 34 Cal. 391; 94 Am. Dec. 742; *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350, and note 373; *Wallace v. Brown*, 22 Ark. 118; 76 Am. Dec. 421, and note 428.

LIS PENDENS. — THE DOCTRINE OF LIS PENDENS HAS NO EXTRATERRITORIAL EFFECT UPON PURCHASERS: *Shelton v. Johnson*, 4 Sneed, 672; 70 Am.

Dec. 265, and note 269. The commencement of a suit in equity does not constitute *lis pendens* when the bill is filed, but only when summons has been served upon the party in interest: *Halloon v. Trum*, 125 Ill. 248.

LIS PENDENS. — DOCTRINE OF, GENERALLY, AS APPLIED TO PURCHASERS: Note to *Shelton v. Johnson*, *supra*; *Green v. Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 760, and note 765.

CITY OF ST. LOUIS v. LAOLEDE GAS LIGHT CO.

[96 MISSOURI, 197.]

ATTEMPTED DEDICATION OF COMMON PROPERTY to a public use as a highway by one tenant in common without the consent of his co-tenants does not affect their rights.

Leverett Bell, for the appellant.

C. and C. E. Gibson, for the respondent.

BLACK, J. This is an action of ejectment to recover a strip of land claimed to be a part of Howard Street. Thomas J. Payne and his four brothers inherited this and other property, and the brothers conveyed to him. Thereafter, and in 1831, Thomas J. Payne made a deed to Samuel McKee, by which he conveyed two parcels of land, each fronting on the Mississippi River, and extending back westward, one 134 and the other 167 feet. There was a strip of land fifty-eight feet wide between the above-described parcels; and by the same deed, Payne conveyed to McKee the undivided one half of this third strip; and this is the parcel of land now in dispute. This deed from Payne to McKee was signed by both parties, and they granted to each other, their heirs and assigns, the free passage and right of way over this third parcel. A plat of the three parcels is attached to the deed, with a certificate of the surveyor thereon, by which he says he surveyed from Payne to McKee two lots of ground with a street between them.

After the date of that deed, and in 1832, Thomas J. Payne made and filed a plat of Payne's addition, by which the parcel of land in suit is designated as Howard Street; the plat undertakes to dedicate the property to public use. In 1859 the heirs of McKee conveyed to McDowell and Rapp, who made a deed of trust on the same property to secure a part of the purchase price, and under which the McKee heirs purchased back the property in 1862. In 1866, they sold to Schulenburg, who conveyed to the defendant in 1872. These

deeds convey the two parcels of land with covenants of warranty, and also the ground covered by Howard Street produced, the property in suit, but without covenants of warranty.

The defendant, though thus claiming through the heirs of McKee, objected to some of the deeds to Thomas J. Payne from his brothers, because of alleged defective acknowledgments, and put in evidence subsequent quitclaim deeds from the same brothers; but it will be assumed, for all the purposes of this case, that the deeds to which defendant made the objections are good and sufficient. Samuel McKee and Thomas J. Payne then became tenants in common of the parcel of land in dispute in 1831, before Thomas J. Payne made the plat, and thereby attempted to dedicate the property to public use. It is true that each gave to the other a right of way over this strip of land; but that did not make it a public highway. The surveyor's certificate attached to the plat, made a part of the deed, does speak of this parcel as a street; but it is clear that Payne and McKee did not by this deed devote the property to public use; at most, they only made the property a private way. Thomas J. Payne, as a tenant in common, could not dedicate the common property to public use without the consent of McKee, his co-tenant. Perhaps one tenant in common may himself be estopped to deny his grant of an easement in the common property; but he cannot create an easement in such property as against his co-tenant: *Scott v. State*, 1 Sneed, 630; *Crippen v. Morss*, 49 N. Y. 63; *Washburn on Easements and Servitudes*, 3d ed., 184; *McBeth v. Trabue*, 69 Mo. 658.

Unless, therefore, McKee, his heirs or grantees, have in some way consented to the appropriation of the property to public use, the attempted dedication by Payne amounts to nothing as against them. The evidence shows that, as far back as 1845, the McKee heirs leased the property in suit to Brooks and Meegan for a ship-yard, and it was used for that purpose from 1853 to 1866; it was then used for quarrying stone therefrom until about 1870, when it was converted into a lumber-yard, and used for that purpose until the defendant became the purchaser thereof. Thus the defendant and those from and through whom it claims have had adverse possession since 1845. There can be no pretense that any part of the property in suit has ever been used as a public highway.. The evidence, therefore, has no tendency to show that McKee, his

heirs or those claiming under them, have ever consented to the appropriation of this property to public use.

The plaintiff has shown no right whatever to recover, and the demurrer to the evidence was therefore properly sustained. It is useless to discuss the other questions presented in the briefs. The judgment is affirmed.

CO-TENANCY. — CO-TENANT CANNOT MAKE A DEDICATION OF A HIGHWAY without the consent of his co-tenants: Freeman on Cotenancy and Partition, 2d ed., sec. 185, citing *Scott v. State*, 1 Sneed, 629.

DEDICATION OF HIGHWAY. — HE WHO DEDICATES A HIGHWAY MUST BE THE OWNER OF THE TITLE: *Bushnell v. Scott*, 21 Wis. 451; 94 Am. Dec. 555; and note to *Lee v. Lake*, 90 Id. 224.

STEPHENS v. HANNIBAL AND ST. JOSEPH R. R. Co.

[96 MISSOURI, 207.]

MASTER AND SERVANT — FELLOW-SERVANT — NEGLIGENCE. — A foreman employed by a railroad company, and having charge of a gang of men who are subject to his orders only, is the agent of the company, and the latter is liable for his negligence in respect to the orders given, as the foreman and the gang of men are not fellow-servants.

MASTER AND SERVANT — NEGLIGENCE — DAMAGES. — Where the master recklessly, carelessly, and negligently orders the servant to do work, when to obey the order at the time and under the circumstances is extra-hazardous, but does not plainly imperil the servant's life or limb, and he, in obeying the order, is injured without his fault, he is entitled to compensatory damages.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — DAMAGES. — Where master orders servant into a situation of danger, and he obeys and is thereby injured, he cannot be deprived of his remedy against his master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose.

MASTER AND SERVANT — OBEYING ORDERS — NEGLIGENCE. — Master and servant are not on an equal footing where they have equal knowledge of danger. It is the primary duty of the servant to obey orders even if dangerous, and it does not follow because the latter could justify disobedience to an order that he is guilty of negligence in obeying it; but the question of negligence is for the jury from all the evidence.

MASTER AND SERVANT — NEGLIGENCE IN OBEYING ORDERS. — Where the servant is ordered by the master to perform dangerous work, he is not guilty of negligence in obeying, unless to do so is clearly to bring on danger to life or limb.

MASTER AND SERVANT — NEGLIGENCE IN OBEYING ORDERS. — The servant is not, at the peril of being discharged, bound to set up his judgment against that of his master, about obeying orders, or about things over which there can be a difference of opinion in the minds of reasonably prudent persons.

MASTER AND SERVANT — EVIDENCE — DAMAGES. — In an action by a servant to recover damages for an injury sustained in obeying an order incurring extra hazard and danger, evidence as to whether plaintiff is a married man, and the number of children he has, is inadmissible, where there is nothing to justify the giving of exemplary damages, and the recovery must be entirely compensatory.

PLEADING AND PRACTICE — EXCLUSION OF EVIDENCE. — Court may exclude improper evidence at the trial, or by an instruction at the close of the evidence; and when this is done, the fact that the jury heard the evidence will not warrant a reversal of the judgment.

MASTER AND SERVANT — NEGLIGENCE — DAMAGES. — The measure of damages in an action for injuries received by a servant in obeying an order incurring extra danger, and negligence on the part of the master, is compensation for the pain suffered, time lost, and permanent injuries incurred, together with expenses in being cured.

Strong and Mosman, and Huston and Parrish, for the appellant.

Henry Smith, for the respondent.

BLACK, J. This case has been here before, and is reported in 86 Mo. 221. It is now freed from any question of negligence on the part of those in charge of the train, and stands on the alleged negligence of Rice, and the alleged contributory negligence of the plaintiff. Now, as on the former appeal, it appears that plaintiff and five others, under John Rice as their foreman, were engaged in raising a part of defendant's track. For that purpose, rocks were distributed along the track by the construction train. Plaintiff and the other laborers put them on the track, broke them with sledge-hammers, and forced the pieces under the ties with tamping-bars. The evidence shows that a west-bound passenger train was behind time. It was heard before it was seen; but when first heard, the men could not tell whether it was on the defendant's road or a train on another road. The train came at a faster rate of speed than usual; and when within one hundred or one hundred and fifty yards of them, Rice told the men to get off the track, and they did so. It was then discovered that there were two stones on the track, about six by twelve inches, as plaintiff says, or the size of a dinner-bucket, as stated by Rice. Plaintiff says: "The foreman said, 'Clear the track,' and we all got off. I then said to Rice, 'Jack, there are two stones on the track'; and he said to me, 'It is time you were getting them off.' I understood this for an order. I undertook to get them out of the way of the train by putting them between the ties, and succeeded

in doing this, but had n't time to remove the tamping-bar with which I was working, and it was struck, while still in my hands, by the engine. The tamping-bar struck my right arm, and turned me around, and I was struck on the left arm and side by the engine. I thought the stones might ditch the train." Says he first saw the train when Rice said, "Clear the track," and that he had just got off when he saw the stones, and called Rice's attention to them, and that the train was then about one hundred yards away. Rice says he, at the same time, saw a hand-car coming towards them, and he started forward to signal those in charge of it to get off the track; that after going a few steps, Stephens was hurt; that the train was in sight when he told Stephens to get the rocks off; that in his opinion it was necessary to remove the stones to avoid danger, and that it was his duty to flag the train when there were obstructions on the track; but he did not flag it that morning. A number of plaintiff's ribs and his collar-bone were broken, and the left arm was so shattered that it had to be amputated.

As Rice had charge of the gang of men, and they were subject to his orders only, there can be no doubt but he was the agent of the defendant, and not a fellow-servant with the plaintiff, in respect of the orders given. His negligence was the negligence of the defendant. Enough was said on this subject when the case was here before.

The court refused an instruction in the nature of a demurrer to the evidence, and, at the request of the plaintiff, gave an instruction, the material portion of which is in these words: "And if the jury further find that plaintiff was one of such workmen so employed on defendant's track under Rice as such foreman, and that Rice recklessly, carelessly, and negligently ordered plaintiff to remove the stones from the track, and that to obey the order at the time and under the circumstances was extra-hazardous, but did not plainly imperil plaintiff's life or limb, and that plaintiff, in obeying the order, was injured because thereof, and without fault on the part of the plaintiff, then the jury will find for the plaintiff, and assess his damages at such sum, not exceeding fifteen thousand dollars, as will compensate him for the injuries sustained."

To remove the stones from the track, under the circumstances disclosed, was surely accompanied with more danger than was ordinarily incident to the business in which the

plaintiff was engaged; and the evidence tends to show negligence on the part of Rice in directing the removal of the stones at the time he gave the order. We do not understand these propositions to be controverted on this appeal. The chief contention is, that the evidence shows that the danger was open and obvious to the plaintiff, that he ought to have disobeyed the order, and for these reasons the demurrer to the evidence should have been sustained. Generally a servant cannot recover for those injuries resulting from causes seen and known by him. But even when there is no order to do a given act, there are some modifications of the general rule. Thus it is held in many cases, where the servant knowingly incurs the risk of defective machinery, still if not so defective as to threaten immediate injury, it is for the jury to determine whether there was negligence on his part: *Huhn v. Missouri Pacific R. R. Co.*, 92 Mo. 443, and cases cited. So, too, where the danger is patent, and is known to the servant, the master may be liable for injuries resulting therefrom, as when he has lulled the servant into a sense of security by insisting there is no danger, or has promised to remove the defect: *Wood on Master and Servant*, sec. 352; *Conroy v. Vulcan Iron Works*, 62 Mo. 36.

And more to the point in this case, a recent text-book uses this language: "If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose": 2 *Thompson on Negligence*, 975. There may be cases where the servant is ordered to do a particular act, and the order is so unreasonable, and the act so manifestly dangerous to life and limb, that the court, on the evidence, should declare the servant guilty of negligence in obeying the order of the master, and should direct a nonsuit. The general rule, however, is, that the question is one for the jury: *Keegan v. Kavanaugh*, 62 Mo. 230.

It cannot be said that the servant and master are on an equal footing, even where they have equal knowledge of the danger. To so say is against common experience, and in disregard of the fact that the servant occupies a position subordinate to the master; the primary duty of the servant is obedience. It does not follow because the servant could

justify a disobedience of the order that he is guilty of negligence in obeying it. In the present case, there was no equal knowledge of the danger; for the plaintiff began to get the stones out of the way the moment he was directed so to do. He did not have the opportunity to observe and calculate the distance to the train or the rate of speed at which it was going that the foreman had, whose duty it was to look out for this train, and be prepared for its coming. True it is, Rice's attention was directed to the hand-car after he gave the order, but this was no fault of the plaintiff. The question of negligence on the part of the plaintiff was eminently one for the jury, and the demurrer to the evidence was properly overruled.

An objection to the plaintiff's instruction is, that it does not furnish any proper limit to his right to recover. The limit given in the instruction is, that the order of the foreman did not plainly imperil plaintiff's life or limb, and that he obeyed the order without fault on his part. The instruction is substantially in the language of this court when this branch of the case was considered on the former appeal. The court, it is true, was not then attempting to formulate an instruction; still, the instruction is not objectionable. As the plaintiff was, by the master, ordered to remove the stones, it cannot be said that he was guilty of negligence in obeying the order, unless to do so was clearly to bring on danger to life or limb; and that is the instruction. The servant is not, at the peril of being discharged, bound to set up his judgment against that of his master about things over which there can be a difference of opinion in the minds of reasonably prudent persons.

The defendant's second and third instructions are to the effect that if Rice said, "You had better be getting them [the stones] off," or "It is time you were getting them off"; that the train was then about one hundred yards distant, and approaching at a rapid rate, — then it was not the duty of the plaintiff to obey the order, and he cannot recover. These instructions were properly refused; for, as we have seen, it was for the jury to say whether or not plaintiff was guilty of negligence, and to determine that question from all the evidence. The fact that plaintiff might justify a disobedience of the order is not the criterion by which to determine whether he was negligent or not in obeying it. Nor do the facts predicated necessarily show negligence. The fact, if such it be, that plaintiff and the foreman had equal knowledge of the

approach of the engine does not necessarily make them equally guilty of negligence, and hence the defendant's further instruction was properly refused. This results from what has been said: *Keegan v. Kavanaugh*, 62 Mo. 230.

Towards the close of the evidence, plaintiff was asked by his attorney whether he was a married man, and if so, how many children he had. Defendant objected; the court overruled the objection, but at the same time stated that the jury must not consider the question or answer in making up their verdict, and especially that it should not be considered in fixing the amount of the verdict should they find for the plaintiff. The plaintiff then answered that he was married, and had four children. This evidence as to the number of his children was incompetent. It could have no bearing on the case whatever, lest it be to increase the amount of damages. There is nothing in the case to justify the giving of exemplary damages, and the damages should be confined to compensation for the injuries sustained. As well might proof be made of plaintiff's financial condition. This, we have held, the plaintiff may not do, when the parent is suing for the death of a minor child: *Overholt v. Vieths*, 93 Mo. 422; 3 Am. St. Rep. 557. Some countenance, it may be thought, is given for the admission of such evidence by what is said in *Conroy v. Vulcan Iron Works*, 75 Mo. 652, and in *Winters v. Hannibal etc. R. R.*, 39 Id. 475. In the case last cited, and upon which the other is based, the evidence as to the number of children had been withdrawn, and the remarks about the competency of the evidence were wholly unnecessary. Besides, there was no claim in that case, as here, that the damages were excessive.

We have no doubt but the trial court may exclude improper evidence during the progress of the trial, or by an instruction at the close of the evidence, and when this is done, the fact that such evidence was heard by the jury will not operate as a reversal of the judgment. Here it is difficult to understand what effect the evidence had, for the jurors are told not to consider it; yet at the same instant the objection is overruled and the evidence admitted. The verdict is for eight thousand dollars. The plaintiff was seriously injured, lost an arm, and was at the hospital three or four weeks, and he says he is unable to do a full day's work, is not half as stout as he was before he received the injury, and suffers at times from his side. This is the evidence as to damages, and there is no evi-

dence of expenditures about being cured. He seems to have been waited on by the defendant's surgeon. We do not say that this judgment should be reversed alone on the ground of excessive damages; nor do we say that it should be reversed because of the evidence before noted, had a specific instruction as to the measure of damages been given; but in view of the very general instruction as to damages, and the amount of the verdict, we cannot escape the conclusion that the incompetent evidence had its effect.

Since this case must be again remanded for new trial, we suggest that the damages, in case of a recovery by plaintiff, be limited by the instructions to compensation for the pain suffered, time lost, and permanent injuries occasioned by defendant's negligence. Of course, should expenses about being cured be shown, they may be recovered. On the other hand, if plaintiff was guilty of negligence contributory to the injuries, he cannot recover. If the approaching train was so close, and the danger so great, that a reasonably prudent person, in the plaintiff's situation, and having such knowledge of the danger as he had, would not have attempted to remove the stones, then he was negligent. So if, in removing the stones, he performed the work in a negligent manner, when to have removed them in a careful and prudent manner would have avoided the calamity, then he cannot recover. These suggestions are not designed to exclude other instructions, but such as are given at the request of the parties, or by the court of its own motion, should conform with what has been said. That given by the court is subject to some criticism.

The judgment is reversed, and the cause remanded for a new trial.

MASTER AND SERVANT—FELLOW-SERVANTS.—FOREMAN IN CHARGE OF A WRECKING-TRAIN IS NOT a fellow-servant of the members of the crew, who are under his orders and control, and master is liable for his negligence in giving orders to the men, which result in their injury without their fault: *Wabash etc. R'y v. Hawk*, 121 Ill. 259; 2 Am. St. Rep. 82, and note 85. When the master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, such agent stands in the place of the principal or master: *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631. Where it is the custom of a railway company to permit the fireman upon its trains to act as engineer in coupling and switching trains, he is, when so acting, to all intents and purposes the engineer of the train, and not the common equal servant or fellow-servant of the brakeman, and the rule of *respondeat superior* applies where a brakeman is injured by his negligence: *Louisville etc. R. R. Co. v. Moore*, 83 Ky. 675. A company of men under the control of a foreman engaged in repairing bridges, water-tanks, and tele-

graph lines along a railway, in going to and from their labor on a hand-car on such railway, are under the control of such foreman, and his principal is liable for his negligence in the course of his employment: *Sioux City etc. R'y Co. v. Smith*, 22 Neb. 775. Where a company engaged in manufacturing employs a person to inspect, repair, and provide machinery for others to operate, who are employed by the same company, he stands in the place of master to those who operate such machinery, and not as a fellow-servant: *Atchison etc. R'y Co. v. McKee*, 37 Kan. 592. But the foreman at a round-house of a railway company is a fellow-servant of an employee working under him: *Brown v. Winona etc. R'y Co.*, 27 Minn. 162; *Gonsior v. Minneapolis etc. R'y Co.*, 36 Id. 385. The foreman of a gang of section or track-men engaged in the discharge of his ordinary duties in the course of his employment is a fellow-servant with them: *Olson v. St. Paul etc. R'y*, 38 Id. 117. And generally, for master's liability for negligence of his representative in regard to inferior servants, see *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; 3 Am. St. Rep. 92; *Farren v. Sellers & Co.*, 39 La. Ann. 1011; 4 Am. St. Rep. 256; *Franklin v. Winona etc. R'y Co.*, 37 Minn. 409; 5 Am. St. Rep. 856, and notes to each of these cases.

MASTER AND SERVANT. — LIABILITY OF MASTER FOR INJURY TO SERVANT obeying dangerous order of his superior: *East Tennessees etc. R. R. Co. v. Duffield*, 12 Lea, 63; 47 Am. Rep. 319; *Luebke v. Chicago etc. R. R. Co.*, 59 Wis. 127; 48 Am. Rep. 483; *Chicago etc. R'y Co. v. Harvey*, 28 Ind. 28; 92 Am. Dec. 282, and note 286.

MASTER AND SERVANT. — LIABILITY OF MASTER FOR INJURY TO SERVANT, where dangerous nature of employment is equally known to both: *Fisk v. Central etc. R'y Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note 28; *Farren v. Sellers & Co.*, 39 La. Ann. 1011; 4 Am. St. Rep. 256, and note 264. If a person specially undertakes to perform peculiarly hazardous employment by operating, knowingly and voluntarily, a machine obviously wanting in appliances suitable for safety, he cannot thereafter be heard to charge that the machinery was of a dangerous kind, and wanting in such appliances: *Philadelphia etc. R'y Co. v. Hughes*, 119 Pa. St. 301. A servant engaged in working about defective machinery is not guilty of contributory negligence, unless he knows or might have known that by reason of the defect his employment involved danger to himself: *Colbert v. Rankin*, 72 Cal. 197. If an employee voluntarily, without specific command as to time and manner, uses an obviously defective implement, the defect being alike open to the observation and within the comprehension of employer and employee, both stand upon common ground, and no recovery can be had for a resulting injury to the latter: *Jenney etc. Co. v. Murphy*, 115 Ind. 566; *Iron Ship etc. Works v. Nuttall*, 119 Pa. St. 149.

MASTER AND SERVANT — FELLOW-SERVANTS — WHO ARE, AND WHO ARE NOT: *McMaster v. Illinois Central R'y Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, and note 657; *Fisk v. Central etc. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note 31, 32; *Krogg v. Atlanta etc. R. R. Co.*, 77 Ga. 202; 4 Am. St. Rep. 79, and note 84.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE GENERALLY QUESTION FOR THE JURY: *Wormell v. Maine etc. R'y Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Craver v. Christian*, 36 Minn. 413; 1 Am. St. Rep. 675, and note 680; *Selinas v. Vermont etc. R'y*, 60 Vt. 249; 6 Am. St. Rep. 114, note 117; *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151, and note 152; *Wallace v. Western etc. R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 346,

and note; *Mynning v. Detroit etc. R'y Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note 813; *Harris v. Township etc.*, 64 Mich. 447; 8 Am. St. Rep. 842, and note 849; *Baltimore etc. R'y Co. v. Kane*, 69 Md. 11; *ante*, p. 387, and note 398.

DAMAGES — PERSONAL INJURIES — RULE OF DAMAGES FOR INJURIES INFLICTED BY NEGLIGENCE: *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235; 71 Am. Dec. 263, note 267. Permanency of the injury is an element of damages: *Raben v. Central etc. R'y Co.*, 74 Iowa, 733. Probable duration of life and capacity to earn money are elements of damage: *Texas etc. R. R. Co. v. Douglass*, 69 Tex. 694. Mental suffering naturally resulting from an injury sometimes is admissible to show actual damage: *Id.* Measure of damages by wife for death of husband is the value of his life, and is not affected by the wants of the family: *Central etc. R'y Co. v. Rouse*, 77 Ga. 393. In estimating the value of a man's life, age, habits, health, occupation, expectation of life, ability to labor, probable increase or diminution of such ability with lapse of time, wages earned, etc., are things to be taken into consideration: *Id.*; *Clapp v. M. & St. L. R. R. Co.*, 36 Minn. 6. But in an action to recover damages for personal injuries caused by defendant's negligence, where no evidence is given as to the circumstances and conditions in life of the plaintiff, his earning power, skill, and capacity, no damages for future pecuniary loss can be awarded: *Staal v. Grand Street etc. R. R. Co.*, 107 N. Y. 625.

SLATTERY v. JONES.

[96 MISSOURI, 216.]

JUDGMENT LIEN ATTACHES TO LAND BOUGHT WITH THE DEBTOR'S MONEY, but the title to which is taken in the name of another for the purpose of defrauding the creditors of the judgment debtor.

LIENS OF JUDGMENTS ATTACH IN THE ORDER OF THEIR RENDITION to lands which have been transferred, or the title to which has been taken in the name of another, for the purpose of defrauding creditors, and have precedence of attachments subsequently levied.

DORMANT EXECUTION. — AGREEMENT TO POSTPONE THE ISSUE OF AN EXECUTION, or directions to a sheriff to hold an execution until further orders, will not prejudice the rights of the plaintiff, if he has a judgment lien, and makes his sale before such lien expires.

Leo Rassieur and Dexter Tiffany, for the appellant.

Martin, Laughlin, and Kern, and Smith and Harrison, for the respondent.

SHERWOOD, J. This is an equitable proceeding, having for its object the determination of the question whether the plaintiff, Slattery, or the defendant, the German Savings Institution, has the better title to the property in controversy. Briefly told, the facts in the case are these: John Jones, being insolvent and largely indebted, for the purpose of defrauding his creditors, conveyed his property to his wife's

trustee in May, 1883; shortly thereafter, the German Savings Institution, one of Jones's creditors, brought suit on a debt contracted antecedent to said transfer, and recovered judgment thereon on January 8, 1884, on which judgment execution was duly issued February 4, 1884, and on that date placed in the hands of the sheriff, returnable to the April term; on this execution, a levy was duly made, on March 11, 1884, upon the property thus fraudulently conveyed, and the same was duly advertised, and sold by the sheriff to the German Savings Institution, and a deed given and recorded April 19, 1884, and return made in due course to said April term. The German Savings Institution then brought suit with diligence, and had the conveyances of Jones declared fraudulent and void as to creditors.

Subsequent to the obtaining of the judgment of January 8, 1884, in favor of said German Savings Institution, and on March 10, 1884, one day prior to the levy of execution thereunder, the plaintiff, Slattery, brought an attachment, and levied the same on the same property, filed notice of his attachment on that day, and followed it by judgment, execution, sale, and deed recorded in June, 1884, and now claims that the subsequent levy of its attachment gave it a better lien upon the land than the German Savings Institution acquired by its prior judgment, followed in due course by execution and sale and deed.

The court below held that a judgment is not a lien upon property fraudulently conveyed prior to its rendition; that such a transfer is not void, but only voidable as against creditors; that the levy of an attachment created a superior lien to the supposed lien of a judgment thus rendered; and decreed the title to be in the plaintiff. Our statute declares that every conveyance of land made with intent to defraud creditors, etc., "shall be from henceforth deemed and taken, as against said creditors and purchasers, . . . to be clearly and utterly void": R. S., sec. 2497.

Further statutory provisions bearing on the point in hand are as follows:—

"Sec. 2730. Judgments and decrees rendered by any court of record shall be a lien on the real estate of the person against whom they are rendered situate in the county in which the court is held."

"Sec. 2731. Such liens shall commence on the day of rendition of the judgment, and shall continue for three years."

"Sec. 2767. The term 'real estate,' as used in this chapter, shall be construed to include all estate and interest in lands, tenements, and hereditaments liable to be sold upon execution."

"Sec. 2361. No execution prior to the levy thereof shall be a lien on any real estate to which the lien of the judgment does not extend."

"Sec. 2354. The following property shall be liable to be seized and sold upon attachment and execution issued from any court of record: fifth, all real estate, whereof the defendant, or any person for his use, was seised, in law or equity, at the time of the issue and levy of the attachment or rendition of the judgment whereon execution was issued," etc.

In his work on executions, Mr. Freeman observes: "Whoever goes out with an execution to seek the fruits of his judgment is too apt to find that fraud has forestalled him. It then becomes his business to pursue those fruits wherever fraud has taken them; to wrest them from the possession of his adversary wherever they may be found, and to prepare himself to show that the refuge whence he has wrested them is still the refuge of fraud. In many instances, the aid of equity is invoked. But generally this is unnecessary; for a transfer made to hinder, delay, or defraud creditors, while as between the parties it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity, — not the right to control the legal title, and have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself against which the fraudulent transfer is no transfer at all: Freeman on Executions, sec. 136.

And though the learned author states that if land be bought with the money of the debtor, and the title taken in the name of another, that in such case the title cannot be reached by execution, but resort must be had to a court of equity; yet he admits that the rule is different in those states where statutes have been enacted which enable creditors to reach the legal title at law, citing, among others, the cases of *Dunnica v. Coy*, 24 Mo. 167; *Rankin v. Harper*, 23 Id. 579; *Eddy v. Baldwin*, 23 Id. 588, where that doctrine is announced as the law of

this state. In *Rankin v. Harper*, *supra*, Leonard, J., said: "Our law subjects all that a man has as property to the payment of his debts, and we know of no reason why the trust that results to him who pays the purchase-money should not be allowed to result to the debtor for the benefit of his creditors, so as to afford them the speedy and easy remedy of an execution sale."

In *Bobb v. Woodward*, 50 Mo. 101, it is declared that "it has become settled law in Missouri, that upon lands held by a third person in fraud of creditors for the benefit of the debtor, or fraudulently purchased with money of the debtor and conveyed to his family, there is a resulting trust to the debtor for the benefit of the creditors, which may be sold upon execution. It is held to be such an equitable estate as is comprehended in the language of the statute, which subjects to sale upon execution 'all real estate whereof the defendant or any person for his use was seised in law or in equity.'" To this effect are all the authorities in this state.

An author of recognized authority says: "If the creditors obtain judgment against the debtor after the transfer, they acquire liens upon his property wherever the same are given by law, according to the dates of their respective judgments, in the same manner precisely as if no transfer had been made; for the transfer is a nullity as against them, and the legal as well as the equitable title remains in the debtor for the purpose of satisfying debts": Bump on Fraudulent Conveyances, 3d ed., 474. This position is abundantly sustained by the authorities: *Jacoby's Appeal*, 67 Pa. St. 434; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Mulford v. Peterson*, 35 N. J. L. 127, and cases cited; *Eastman v. Schettler*, 13 Wis. 324; *Thomas v. Walker*, 6 Humph. 93; *Thomason v. Nelley*, 50 Miss. 310; *Scouton v. Bender*, 3 How. Pr. 185; *McKee v. Gilchrist*, 3 Watts, 230.

I find no case in this court where the point has been directly decided in accordance with the cases just cited; but such a decision necessarily results from our statutes and adjudications already quoted. If, as against creditors, the fraudulent conveyance of the debtor is a nullity, a dead letter, "clearly and utterly void," as the statute puts it, how is it possible for such a conveyance, even though it be prior in point of time, to balk a creditor's judgment of its customary and binding force and operation? If our statutes are to receive the meaning which their plain language imports, I

cannot see how the attitude of this case differs from that of one where the fraudulent conveyance is made subsequently to the recovery of judgment.

It is said, however, that if a conveyance be made by the fraudulent grantee, it would pass a good title to an innocent purchaser, as against the alleged judgment lien; and that this circumstance shows that the judgment cannot be a lien against the property. I cannot admit the force of this argument, because similar reasoning would deny the existence of a vendor's or a vendee's lien, if the land bound thereby were conveyed to an innocent purchaser. But suppose the purchasers were not innocent, would the alleged judgment lien bind them? Can it be possible that the lien of a judgment is dependent upon the fact whether the last purchaser be innocent or fraudulent? The considerations which allow the fraudulent grantee of a fraudulent grantor to convey a good title to a *bona fide* purchaser are considerations which exclusively belong to our registry acts, and have no bearing on the question of the existence and validity of the judgment lien.

All that the last purchaser — innocent, of course — has to look to is, that the title of his immediate grantor is clear upon the record; he is not bound to search for judgment liens occurring subsequently to the time of his grantor's acquired title. Moreover, but for statutory provisions requiring that an abstract of the land attached be filed in the recorder's office, it is to the last degree doubtful whether the property of A, fraudulently conveyed to B, and afterwards attached as that of A, would be affected by the attachment lien, when subsequently conveyed to innocent purchaser C.

And if the debtor, by reason of the fraudulent conveyance, has no interest to which the lien of a subsequently rendered judgment could attach, it is very difficult to see what interest would be left in him which can be seized by the subsequent levy of the writ of attachment. It appears to me that the same argument which defeats the one also defeats the other. If there be nothing remaining for the judgment lien to fasten on, how will the attachment lien fare any better? The fact that the judgment lien is a general one, and the attachment lien a specific one, cannot alter the case or vary the result, since, in either instance, there must be something, and that something an interest of the debtor in the real estate, upon which the general binding force of the judgment or the specific force of the attachment writ can operate.

Now, all the cases in this state show that the debtor, in instances similar to the one at bar, has a leviable interest in the fraudulently conveyed property, and wherever this is the case, "the right to issue execution, and to satisfy it by the sale of the real estate, ordinarily implies that the judgment is a lien upon such real property," and "because the lien of a judgment is inseparably associated with . . . the right to take lands in execution, it follows that there can be no lien except upon such judgments as the plaintiff is entitled to satisfy by levy upon the lands of the debtor": Freeman on Judgments, secs. 340, 350. Indeed, it is impossible to conceive of a judgment capable of being enforced against real property upon which it is not a lien: *Stadler v. Allen*, 44 Iowa, 198, and cases cited.

In this case, it will scarcely be denied that the judgment of the appealing defendant was capable of being enforced by execution against the property of Jones while it remained in the hands of his fraudulent grantee; to deny this would be to deny and to annul the force and effect of our statutes on this subject and numerous decisions based thereon. The only question here at issue is one of priority between the judgment lien and that of the attachment. But according to the premises, if the judgment was capable of enforcement, then it must have been a lien. The capability of enforcement being established presupposes the existence of a lien which is the basis of such capability.

Here, then, we have, — 1. A fraudulent conveyance of real estate, and for that reason void; 2. Such real estate liable to be sold upon execution as that of the fraudulent grantor and debtor; 3. A judgment rendered against such debtor, which the statute declares shall bind with its lien all real estate, etc., liable to be sold upon execution. When all these things are taken into consideration, it seems to me that there is no room left to doubt that the judgment of the German Savings Institution created upon the premises in controversy a lien which must be regarded and declared as the elder legal lien, — one which cannot be displaced by any junior lien whatsoever: Freeman on Executions, sec. 196; *Wakeman v. Grover*, 4 Paige, 23; *Scouton v. Bender*, 3 How. Pr. 185. Nor must it be overlooked that, at the time the attachment of the plaintiff was levied, there was in the hands of the sheriff an execution issued on the judgment of the appealing defendant.

This execution, according to the terms of the statute (sec-

tion 2361, *supra*), was a lien, also, upon the property in controversy; and it is by no means certain that a levy of the execution was necessary in order to a valid sale of that property: Freeman on Executions, sec. 280. This court has confessed that the law is silent as to what acts are necessary to constitute a levy on real estate: *Duncan v. Matney*, 29 Mo. 368; 77 Am. Dec. 575. When the sale was made under this execution, and a deed made to the purchaser, the deed related to the date of the judgment (*Union Bank v. Manard*, 51 Mo. 548), and cut out all intervening liens and encumbrances: *Durrett v. Hulse*, 67 Id. 201.

In relation to the delivery of the execution to the sheriff to hold for further orders, no importance is to be attached to it. The land was sold at the return term of the writ, and the delay was satisfactorily explained by counsel. But even had it not been thus explained, there exists no reason why the rights of the defendant should be postponed or subordinated to those of the plaintiff. There was no hindrance of the plaintiff from attaching the property. There is a very wide distinction in this regard between liens upon real and those upon personal property: *Ensworth v. King*, 50 Mo. 479; Bump on Fraudulent Conveyances, 571. Dormancy cannot be affirmed of an execution in regard to a sale of land. Even agreements to postpone the issuance of execution, where land is to be the subject of sale, will have no prejudicial effects on the rights of the creditor, who relies upon his judgment lien, and not upon his execution lien, as is the case where personal property is to be sold: Freeman on Judgments, sec. 383.

In conclusion, it has not been thought necessary to review, in detail, the authorities which are opposed to the views here announced, as to a judgment being a lien upon property previously transferred to a fraudulent grantee, for the reason that those views are thought to be best supported by reason and authority, and that they are in consonance with our own statutes and adjudications in relation to matters similar to those involved in this controversy.

The result is, that the judgment must be reversed, and the cause remanded.

JUDGMENT LIENS. — JUDGMENTS ARE LIENS AT LAW, AND TAKE PRECEDENCE ACCORDING TO THE DATE OF THEIR RECORD: *Jackson v. Holbrook*, 36 Minn. 494; 1 Am. St. Rep. 683, and note 691; but a junior lien placed upon land takes precedence, after the statutory period expires as to senior lien, and the former judgment cannot be revived by its owner, so as to take

precedence as a first lien again: *Boyle v. Maroney*, 73 Iowa, 70; 5 Am. St. Rep. 657, and note 663; *Virden v. Shepard*, 72 Iowa, 546. Judgments are liens having priority over subsequent mortgages: *Cohn v. Hoffman*, 50 Ark. 108.

JUDGMENT LIENS. — THE LIEN OF A JUDGMENT EXPIRES AT THE END OF TEN YEARS FROM TIME it is docketed; and after that time, action on such judgment is barred, as well as a motion to revive it: *Lilly v. West*, 97 N. C. 276. Judgment liens are creatures of law, and cannot be enforced in equity when they have ceased to be enforceable at law: *McCarty v. Ball*, 82 Va. 872; *Hutchison v. Grubbs*, 80 Id. 251; *Sutton v. McKenney*, 82 Id. 46; *Cabel v. Given*, 30 W. Va. 760; but where, within seven years from the rendering of a judgment, an execution was issued, and an entry of levy made by the sheriff, which levy was dismissed by the court, this was sufficient to prevent judgment from becoming dormant: *Banks v. Zellner*, 77 Ga. 424. If five years are allowed to elapse after the entry of a judgment without an execution having been issued thereon, no execution can thereafter issue on such judgment without leave of court: *Parsel v. Deal*, 16 Or. 295.

JUDGMENT LIEN ATTACHES TO REAL PROPERTY CONVEYED BEFORE JUDGMENT rendered, when such conveyance was made with intent to prevent the judgment from being enforced against it: *Van Vleet v. Halsey*, 87 Kan. 116.

JUDGMENT. — AGREEMENT OF PARTIES, WHERE A JUDGMENT is taken, which is a specific lien on certain real estate, that no order of sale shall issue until appeal pending in the supreme court from another judgment against defendant shall be disposed of, and that the judgment first named shall be annulled in event of a decision favorable to defendant on the merits of the cause appealed. but otherwise shall be collectible, and where afterwards such appeal is dismissed without further agreement between the parties, cannot in any manner prevent the collection of such judgment by a sale of realty upon which it is a special lien: *Root v. Burton*, 115 Ind. 495.

JOHNSON v. MISSOURI PACIFIC RAILWAY COMPANY.

[96 MISSOURI, 340.]

MASTER AND SERVANT — NEGLIGENCE — DEFECTIVE APPLIANCES. — In an action by a servant against his master for negligence in furnishing improper or unsafe appliances for the servant's use, the petition must allege that the master either knew, or by the exercise of ordinary care might have known, of the dangerous and defective construction of the appliance; but an allegation that the master negligently furnished an appliance which was defective and unsafe is an equivalent averment, and sufficient.

PLEADING AND PRACTICE — DEFECTIVE ALLEGATION CURED BY VERDICT. — In an action by a servant against his master for negligence in furnishing unsafe or improper appliances, an allegation that "said defendant, wholly neglecting and disregarding its duty to this defendant," etc., though defective, is cured by verdict, when it appears that the second use of the word "defendant" was a mere clerical error, and the petition contains the other necessary averments.

PLEADING AND PRACTICE — WAIVER OF FORMAL DEFECTS IN PETITION. —

Where defendant pleads to the merits, he waives objection to mere formal defects, and cannot object that the petition does not state a cause of action. Such objection can only be interposed when the petition fails altogether to state any cause of action, and not where it is defectively stated.

MASTER AND SERVANT — DEFECTIVE APPLIANCE — EXPERT EVIDENCE. —

In an action against a railroad for damages for an injury received through defective appliances while in its employ, where it is averred that the appliance in question had been repaired at defendant's shops, and that it was owing to the imperfect and brittle condition and flaws in such appliance negligently furnished that plaintiff was injured, the evidence of two blacksmiths that the appliance had not been repaired with reasonable skill is admissible; and it is also admissible as showing defendant's knowledge of the defective condition of the appliance after being repaired by its agents in its shops.

PLEADING AND PRACTICE — INSTRUCTIONS. — "REASONABLE CARE AND DILIGENCE" need not be defined in an instruction where the term is necessarily used, in the absence of a request that it be defined.

MASTER AND SERVANT — DEFECTIVE APPLIANCE — DAMAGES. — In an action by a servant for damages for injury received through unsafe appliances furnished, where it is shown that plaintiff is aged thirty-five years, that his right eye was entirely destroyed, that the other eye was thereby affected whenever he took cold, and that he could not do more than half the work he could before the accident, a verdict for five thousand dollars is not excessive.

Thomas J. Portis, and Smith, Silver, and Brown, for the appellant.

James A. Spurlock, for the respondent.

NORTON, C. J. This case is here on defendant's appeal from a judgment recovered by plaintiff in the Morgan County circuit court for five thousand dollars damages for personal injury; and as exception was taken to the action of the trial court in overruling defendant's objection to the introduction of any evidence because the plaintiff's petition did not state facts sufficient to constitute a cause of action, it necessitates an insertion of so much of the petition as bears upon the question involved. Omitting the formal parts of the petition, it is as follows: "That on the thirteenth day of July, 1885, the said defendant was operating a branch railroad from Boonville, Missouri, to Versailles, and this plaintiff was employed by it as foreman or section-boss on a section of said road leading from Versailles, Missouri, to Akinsville, Missouri, a distance of about nine miles, and it was part of his duty as such servant of defendant to help drive railroad spikes, and cut iron rails, and keep defendant's track in good, safe condition,

and it was the duty of defendant to furnish him good and reasonably safe and sufficient tools for that purpose; but that the said defendant, wholly neglecting and and disregarding its duty to this defendant in that behalf, did furnish him a large hammer weighing about eight pounds, for the purpose of driving railroad spikes, and cutting iron side-rails by striking other sharper instruments, which said hammer was newly laid and repaired at the shops of the defendant by its own employees, and looked to an unskilled man to be sound and safe to work with, when in truth it was not safe and sound; and on the thirteenth day of July, 1885, while this plaintiff and his assistants were cutting an iron rail, and using the said hammer so negligently furnished him by said defendant, and while acting under its order, and in the scope of his employment, a piece of said hammer flew off and struck this plaintiff in the right eye, owing to the imperfect and brittle condition and flaws in said hammer so furnished him by the defendant, and which imperfections and unsafe condition of the said hammer could not be discovered with due caution and care by an unskilled servant. By means whereof his said right eye was knocked out, and the eye-ball and sight totally destroyed, etc., and that he was thereby damaged in the sum of ten thousand dollars."

The specific objection urged to the above petition is, that it does not allege that defendant either knew, or might by the exercise of ordinary care have known, that said hammer was not reasonably safe for the purposes for which it was to be used. In the case of *Crane v. Missouri Pac. R. R.*, 87 Mo. 588, it is held that in an action by a servant against his master for negligence in furnishing improper or unsafe appliances for the servant's use in his work, the petition must allege that the master either knew or might by the exercise of ordinary care have known of the dangerous and defective construction of the appliance, or it must contain an equivalent averment, and that an allegation that the master negligently furnished an appliance which was defective and unsafe is an equivalent averment, and sufficient. Under this ruling, the objection to the sufficiency of the petition, based on the ground stated, is not well taken, as it is therein averred that the unsafe hammer was negligently furnished plaintiff by defendant.

It is also insisted that the petition is insufficient because of the averment that "the said defendant, wholly neglecting and disregarding its duty to this defendant in that behalf, did fur-

nish him a large hammer," etc. It is quite apparent that the second use of the word "defendant" in the above-quoted paragraph in the connection in which it appears was a clerical mistake, and inasmuch as it sufficiently appears from other averments in the petition that the hammer in question was negligently furnished plaintiff by defendant, the defect or clerical error in the petition would, under section 3582 of the Revised Statutes, be cured by verdict. And if so, under the ruling made in the case of *Hurst v. City of Ash Grove*, 96 Mo. 168, the defect in the petition could not be taken advantage of by an objection made on the trial to the introduction of any evidence. It is held in the above case that where a defendant pleads to the merits, he waives objections to mere formal defects, and will not be heard on the trial to object that the petition does not state a cause of action. Such an objection can only be interposed at the trial when the petition fails altogether to state any cause of action, and not to a petition where a cause of action is defectively stated.

It is also insisted that the court erred in overruling defendant's demurrer to the evidence. Plaintiff, in his own behalf, testified as follows: "I was in the employ of the defendant in July, 1885; I was employed as section foreman on the Boonville branch; the Missouri Pacific was operating it; it was my duty to keep the track in shape; my orders were the same as the balance of the men; I had to use tools to shovel dirt, claw-bars, hammers, for drawing spikes, chisels for cutting rails. I used two spike-hammers; one I sent to the repair-shops to be repaired, and it came back in good shape, or looked to be; it was repaired at Chamois, at the repair-shops; my orders were to send tools that needed repairing to the repair-shops; it needed repairing, it was worn; when it came back it was well dressed up, in good shape, and looked all right; on the thirteenth day of July, 1885, I was using the hammer; I took out a rail and was cutting it in two, or the end off from it; one of my men was striking with the hammer, and I was holding the chisel, when all at once a piece flew off from the hammer and struck me in the eye; it knocked the sight of my eye right then and there; the piece of the hammer came off from the face, or the edge of the face; I do not know how much of it hit me." He further testified that he had no knowledge of any defect in the hammer; that he looked at it several times after it had been repaired, and it looked good and sound; that after he was hurt,

he showed the hammer to Smith and Hardy, both of whom were blacksmiths.

James Hunter testified that he was present when Johnson had his eye knocked out; that they were cutting the end off a rail; that before using the hammer he examined it, and it looked as nice as he ever saw one. Johnson put the chisel on the rail, and he struck it a few blows, and a piece broke off the outer edge of the hammer and struck Johnson in the eye; that after it broke, he looked at the hammer, and it seemed to be absolutely bursted, cracked all round; that he showed it to Mr. Smith, a blacksmith.

Smith testified that he was a blacksmith, and had been in the business for more than twenty years; that the hammer was full of flaws all around the outer edge, and one little piece was gone; that the repairing on the hammer had not been done in a skillful manner, or it would not have had those flaws.

Hardy testified that he had been a blacksmith ten years, and knew about the temper of tools; that he was shown a hammer after Johnson was hurt; the face of the hammer had little cracks on the edge; it was either caused by being hardened too hard or bad material; that the hammer was not repaired with as much caution as it might have been. In the light of this evidence, the court was warranted in overruling the demurrer to it, and justified in submitting the case to the jury.

It is also insisted that the court erred in overruling defendant's objection to the reception of the evidence of the two blacksmiths, Smith and Hardy, as to the hammer not having been repaired with reasonable skill. The petition alleges that the hammer in question had been repaired at defendant's own shops, and it was owing to the imperfect and brittle condition and flaws in the hammer negligently furnished him that plaintiff was injured. Under these averments, the evidence was admissible, and also as bearing upon the question of defendant's knowledge as to the defective condition of the hammer, the repair of it having been made or done by defendant's agent in its repair-shops, thus making the knowledge of the agent the knowledge of his principal; and in this respect, this case is distinguishable from the case of *Gutridge v. Missouri Pacific R. R. Co.*, 94 Mo. 468.

But one instruction (no others being asked) was given, which is as follows: "The court, on motion of the plaintiff,

instructs the jury that if they believe from the evidence that on or about the thirteenth day of July, 1885, plaintiff was in the employment of defendant as section foreman or boss on its line of railroad operated by it, and that while in the discharge of his duties as such employee, he was, without carelessness or negligence on his part which contributed directly thereto, struck by a piece of steel or iron in his right eye, by flying off from a large hammer, which defendant furnished him to use in their business in cutting iron rails, and that said hammer was unreasonably unsafe and unsound to use for the purpose for which it was furnished, and that the defective and unsafe condition of said hammer was unknown to plaintiff, and could not have been known to him by ordinary care or caution on his part, but was known to defendant, or might have been known by the exercise of reasonable care and diligence on the part of the defendant, or its servant or agent who made or repaired it, the jury must find the issue for the plaintiff, and assess his damages in such sum as will compensate him for the injury he has sustained, taking into consideration the pain and anguish he has suffered in mind or body, not to exceed ten thousand dollars."

This instruction is objected to, on the alleged ground that it submits to the jury a case not made by the petition, and because it does not define what is meant by the words "reasonable care and diligence." Neither of these points is well taken. A comparison of the instruction with the petition fails to show any departure from the case presented by the petition; and as to the failure of the court to go further and define the meaning of the words "reasonable care and diligence," we have not been cited to nor have found any authority going to the extent of saying that the mere omission to give an instruction defining the above terms, where none is asked, is reversible error. None of the cases to which we have been cited go to that extent. It is held in one of them — *Buel v. St. Louis Transfer Co.*, 45 Mo. 562 — that the use of the words "undue carelessness," in the circumstances of that case, and as applied to it, was reversible error.

It is next insisted that the damages are grossly excessive, and that the judgment for that reason should be reversed. In view of the evidence that plaintiff was of the age of thirty-five years, that his right eye was entirely destroyed, that the other eye was affected whenever he took cold, and that he could not do more than half the work he could do before the accident,

we are not prepared to say that a verdict and judgment for five thousand dollars is excessive.

The judgment is affirmed.

DEFECTIVE MACHINERY — COMPLAINT — WHAT IS SUFFICIENT STATEMENT OF CAUSE OF ACTION for injury through defective machinery: *Columbus etc. R'y Co. v. Arnold*, 31 Ind. 174; 99 Am. Dec. 615; *Bumell v. Laconia Mfg. Co.*, 48 Me. 113; 77 Am. Dec. 212; *Gutridge v. Missouri etc. R'y Co.*, 94 Mo. 468; 4 Am. St. Rep. 392.

COMPLAINT, DEFECTS IN, WHEN CURED BY VERDICT: *Richardson v. Farmer*, 36 Mo. 35; 88 Am. Dec. 129, note 134; *Orussen v. White*, 19 Iowa, 109; 87 Am. Dec. 420.

COMPLAINT, DEFECTS IN, WHAT WAIVED BY FILING AN ANSWER: *Smith v. Silence*, 4 Iowa, 321; 65 Am. Dec. 137; *Riser v. Snoddy*, 7 Ind. 442; 65 Am. Dec. 740; *Cooke v. England*, 27 Md. 14; 92 Am. Dec. 618.

DEFECTIVE MACHINERY. — EVIDENCE OF DEFECTS IN APPLIANCES: *Atchison etc. R. R. Co. v. Saddler*, 38 Kan. 128; 5 Am. St. Rep. 729. Where repairs are made upon a machine shortly after an accident has occurred at the machine, evidence of such repairs is competent as tending to establish that it was not safe at the time of accident: *Atchison etc. R. R. Co. v. McKee*, 37 Kan. 592.

MASTER AND SERVANT. — LIABILITY OF MASTER FOR INJURY TO SERVANT THROUGH DEFECT in a machine which had been repaired by a machinist in employ of the master: *Moynihan v. Hills Co.*, 146 Mass. 586; 4 Am. St. Rep. 348, and note. As to master's liability for defective appliances, see *Wuotilla v. Duluth etc. Co.*, 37 Minn. 153; 5 Am. St. Rep. 832, and note 836; *Sherman v. Menominee River Lumber Co.*, 72 Wis. 122; *Philadelphia etc. R'y Co. v. Hughes*, 119 Pa. St. 301; *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701.

DAMAGES. — EXCESSIVE VERDICT, WHAT IS NOT: *Louisville etc. R. R. Co. v. Brooks's Adm'r*, 83 Ky. 129; 4 Am. St. Rep. 135, and note 142; *Sheehy v. Kansas City etc. R'y Co.*, 94 Mo. 574; 4 Am. St. Rep. 396; *Little Rock etc. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51; *Ballinger v. St. Paul etc. R. R. Co.*, 36 Minn. 418; 1 Am. St. Rep. 680, and note 683; *Central R. R. v. Smith*, 76 Ga. 209; 2 Am. St. Rep. 31, and note 40. What is: *Louisville etc. R. R. Co. v. Stacker*, 86 Tenn. 343; 6 Am. St. Rep. 840, and note 847; *Hurt v. St. Louis etc. R'y Co.*, 94 Mo. 255; 4 Am. St. Rep. 374, and note 381.

LAMPERT v. HAYDEL.

[96 MISSOURI, 429.]

WILLS — CONSTRUCTION OF CLAUSE AGAINST ALIENATION. — Where a testator devises land in trust “for the use and benefit of my three sons, in equal shares, so long as they all may live, with power to use and enjoy equally the rents, issues, and profits thereof during their natural lives. . . . My object in making the foregoing disposition of my property, and in attaching the limitations aforesaid, is to secure to my children a certain annual income beyond the accident of fortune and bad management on their part; and with this end in view, to take away from them the power of disposing of the same, or of creating any lien thereon, or of making the same liable in any way for their debts,” such limitation on the disposition of the income is valid, and not void as being in restraint of alienation.

J. K. Hansbrough, E. B. Adams, and Hitchcock, Madill, and Finkelnburg, for the appellant.

Albert Arnstein, Henry I. D’Arcy, and Cunningham and Eliot, for the respondent.

SHERWOOD, J. The clause of the will of George R. Jacobs, deceased, brought in question by this litigation, is as follows: “I give and devise the next, or middle lot, and the storehouse thereon, . . . to the said John Byrne, Jr., and F. L. Haydel, of St. Louis County, in trust, and for no other purpose, for the use and benefit of my three sons, William H., Charles A., and Junius, in equal shares, as long as they all may live, with power in my three sons to use and enjoy equally the rents, issues, and profits thereof during their natural lives. When all three of my said sons have died, it shall be the duty of said trustees, or their successors in office, to convey this lot and the storehouse thereon in fee-simple to the descendants or heirs at law of William H., Charles A., and Junius, in equal proportions, *per stirpes*. As long as any of my three sons, just named, survive, the said trustee shall hold said property in trust for the use and benefit of the survivor, or survivors, and the descendants or heirs at law of the deceased. . . . My object in making the foregoing disposition of my St. Louis property, and in attaching the limitations aforesaid, is to secure to my children a certain annual income beyond the accident of fortune and bad management on their part; and with this end in view, to take away from them the power of disposing of the same, or of creating any lien thereon, or of making the same liable in any way for their debts.”

John Byrne, Jr., one of the trustees named in the will, declining to act, the defendant, Haydel, is the only acting trustee. He took charge of the property in 1878, collected the rents, etc. In April, 1885, Junius Jacobs executed and delivered to plaintiff a deed of assignment, purporting to convey to him all the interest in the rents and profits of the property accrued and thereafter to accrue. The defendant, having been notified of the assignment, refused to recognize it as valid. The plaintiff thereupon instituted this proceeding against him to compel an accounting, for judgment for the amount found to be due upon such accounting, and for other and further relief.

The answer of the defendant denied that the plaintiff acquired any interest in the rents and profits by reason of the assignment, and alleged that said assignment, under the terms of the will, was void. He further alleged that neither at the date of the assignment to plaintiff nor since that date did he have any money in his hands, arising from said rents and profits, due said Junius Jacobs or the plaintiff. His answer concludes with a prayer that the court would construe the aforesaid clause of the will, and enter a decree for the guidance and protection of him in his capacity as trustee. The circuit court held the clause in the will restraining the alienation of the rents and profits void, the assignment valid, and as the testimony showed that the defendant had in his hands \$163.96 at the hearing of the cause, a decree was entered allowing the trustee \$30 for answering, and gave judgment against him for the residue and costs. He thereupon appealed to the St. Louis court of appeals, where the judgment of the lower court was reversed; but inasmuch as Lewis, P. J., dissented (basing his conclusion on the ground that the majority opinion was contrary to two decisions of this court, in *McDowell v. Brown*, 21 Mo. 57, and *McIlvaine v. Smith*, 42 Id. 45, 97 Am. Dec. 295), the cause was transferred to this court under the provisions of section 6 of the constitutional amendment concerning the judicial department.

The prominent point in this cause, one which overshadows all the rest, is: Were the limitations in this will void as being in restraint of alienation? If this question be answered in the negative, it will be needless to inquire as to the correctness of the ruling in regard to stating the account between the plaintiff and the defendant, or as to the amount due the former, since the defendant has not refused to come to an

accounting with his *cestui que trust*, nor show any unwillingness to respond to his obligation towards him, so that a negative answer, as aforesaid, disposes of the whole case, so far as concerns the plaintiff; and this is all that is necessary to do. In order, then, to determine what answer shall be returned to the question propounded, it becomes necessary to examine the clause of the will upon which both the plaintiff and the defendant rely to support their respective contentions.

An examination of that clause, in connection with the authorities, leaves no room to doubt, that, taken as a whole, it lacks nothing either of form or substance to make the intent of the testator effective, provided that intent is such a one as a court of chancery can sanction, protect, and effectuate.

That the testator intended to give his sons but a limited control over the rents, issues, and profits of the realty devised to the trustees, a control beginning only upon payment to them of such rents, etc.; that he intended those rents should be inalienable; that they should not be anticipated; that they should be unsubject to any debts or liens created by the beneficiaries,—is quite too plain for argument; and this is especially true where the duty of the courts is considered,—a duty emphasized by statute,—to make the intent of a testator the polar-star of construction: R. S., sec. 4008; *Hall v. Stephens*, 65 Mo. 670; 27 Am. Rep. 302. The validity of the devise, therefore, as against creditors and assignees, is the only question at present at issue. It will be proper to ascertain, before proceeding further, whether the cases already cited from our own reports have any material bearing on the point under discussion.

That of *McIlvarne v. Smith*, 42 Mo. 45, 97 Am. Dec. 295, was a case where a man attempted to place property, its rents and profits, in the hands of a trustee, so that neither could be reached by his creditors,—a case where “the beneficiary himself was the donor,”—and it was held this could not be done. This was the point in judgment, and any remarks of a broader scope must be classed as *dicta*. The case of *McDowell v. Brown*, 21 Mo. 57, was one which involved the construction of a deed not a will. The granting clause was to “the grantee” and her heirs from henceforth and forever. Subsequent to this granting clause were words indicating a desire on the part of the grantor that the grantee, his daughter, should not alienate the estate, but that upon her death the property should “revert to the children of my said daughter, as well

living as to be born." And on these words it was claimed that the daughter only took a life estate, with remainder to the children. But it was ruled that the fee having passed by the granting clause, any subsequent restriction upon alienation being repugnant to the fee granted was void, and this was the only point in judgment. Anything else said in the case was said *arguendo*, and does not carry with it the force of an adjudication, nor does the language used even in argument at all bear upon the point whether there could be, as to a life estate, a restriction upon alienation.

In quite a recent case in this court, where a deed came under consideration, an instrument which contained apt and sufficient words to confer a fee upon the first taker, but failed to expressly convey a life estate to her, and the rule was invoked that the remainder over was void, we refused to apply the rule, notwithstanding there was a decided repugnancy between the legal significance of the two clauses in controversy; and we examined "the face of the entire deed in question," and from that examination we deduced the conclusion that, as the object was to give a life estate to the daughter, with remainder over to the husband, we ought to "make the intention of the parties effectual," and so it was ruled: *Bean v. Kenmuir*, 86 Mo. 666. That case strongly exemplifies the growing tendency in modern adjudication to give as much consideration to the claims of obvious justice as to the demands of an arbitrary and technical construction.

There is nothing, therefore, in the two cases heretofore mentioned, and which occasioned the transfer of this cause, to prevent the consideration of the case at bar upon correct principles, and as a case of first impression in this court. Those affirming the validity of the clause of the will, as against the claims of creditors or assignees, have cited authorities showing that the doctrine of restraint upon alienation does not apply even to a legal life estate, but only to estates in fee. And authorities have been cited of a contrary effect. The weight of authority would seem to favor the conclusion that such restraints are not invalid except when annexed to a legal title in fee. And there is certainly great force in the position that if a legal estate for life can be fettered by a restraint upon alienation, that a more rigid rule should not prevail in regard to equitable life estates. But it may be conceded that restraints upon the alienation of legal life estates are invalid at law, and still it does not follow that such

restraints are invalid in respect to estates in equity of a similar duration.

The reasons for this view of the matter will now be presented, and they will be confined to the question here at issue, i. e., whether a restraint may be imposed upon the alienation of an equitable life estate, such as was created in the assignor in the present instance. Trusts of this character are the "creatures of equity"; they had their origin in courts of chancery, and are alone cognizable in such courts. The growth of the system of jurisprudence pertaining to them has been slow and gradual in its development, and the methods and the nature of the relief given in respect of them consist in the application of old principles to new cases as they arise, according to their exigency: 1 Perry on Trusts, secs. 7, 8, 17; 1 Story's Eq. Jur., 13th ed., par. 49. Being the creatures of equity, they must be and are administered and enforced in accordance with the inherent and peculiar rules which pertain to that system of jurisprudence. Sometimes those rules accord with and are in conformity to the rules of law; sometimes they vary from them partially or totally.

It has been urged that the restraint upon alienation, which is allowed in trusts for the separate use of married women, is an exception which proves the rule that such restraints are not to be allowed in other cases. But it must be remembered that this exception, as well as the doctrine upon which it is grafted, are both of comparatively modern growth. The doctrine that a married woman could have a separate estate, an estate free from the control of her husband, only dates back to the first quarter of the last century. In *Hulme v. Tenant*, 1 Brown Ch. 16, decided in 1778, it was ruled that a limitation to the separate use did not prevent the *feme* from aliening.

But it was found that this doctrine gave very insufficient protection to married women, as they were still in danger of parting with their property under the influence or coercion of their husbands. Subsequently, Lord Thurlow, happening to be nominated as trustee of Miss Watson's settlement, directed the insertion of the words "and not by anticipation." But even such words are not necessary, if an intention to restrain anticipation can be gathered from the whole instrument: *Ire Ross's Trust*, 1 Sim., N. S., 199; *Doolan v. Blake*, 3 I. R. Eq., N. S., 349. Then the question arose, when the settlement was made on a *feme sole*, whether a clause restraining alienation would apply as to a future and unknown husband. At

first it was ruled that it would not: *Massey v. Parker*, 2 Mylne & K. 174. But Lord Cottenham, who had decided the case just cited, overruled it in *Tullett v. Armstrong*, 4 Mylne & C. 377, 390, decided in 1840, wherein he ruled that when property was given for the separate use of a woman, it would shift with her condition, be at her disposal when single or discreet, and come anew into operation and vigor when marital relations were entered into. It is observable of that case that it overrules the principles announced in *Newton v. Reid*, 4 Sim. 141, decided in 1830, and *Malcolm v. O'Callaghan*, 5 L. J. Ch. Cas. 137, decided in 1836, and other cases, that notwithstanding a restriction against alienation, yet that such restriction was void unless there was a gift over in that event, — the very same doctrine as that asserted in 1811, in *Brandon v. Robinson*, 18 Ves. 429, and upon which the plaintiff relies for success in the present instance.

Lord Cottenham was in much doubt as to the ground upon which to base his decision in *Tullett's* case, *supra*; but finally, after much consideration, he placed it upon the broad ground that a court of chancery had an inherent power to modify estates of its own creation, and in virtue of that jurisdiction to establish the validity of the separate use to the fullest extent, in order to effectuate the intention of the donor, which might be defeated but for such interposition. He said: "When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a *feme sole* as to bring with it all the incidents of property, and that she might therefore dispose of it as a *feme sole* might do, it was found that, to secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority not now to be questioned, but which could only have been founded upon the power of this court to model and qualify an interest in the property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases. If any rule, therefore, were now to be adopted by which the separate estate should in any case be divested of the protection of the clause against anticipation, it would, in such cases, defeat the object of the power so assumed. A *feme covert* with a separate estate not protected by a clause against anticipation is, in most cases, in a less secure situation than if the property had been held for

her simply upon trust. In the latter case, this court, with the assistance of her trustees, can effectually protect her; in the other, her sole dependence must be upon her husband not exercising that influence or control which, if exercised, would, in all probability, procure the destruction of her separate estate. In the case of a gift of separate estate, with a clause against anticipation, the author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this court should subject her to it, and by so doing defeat his purpose, and completely alter the character and security of his gift? The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together": *Tullett v. Armstrong*, 4 Mylne & C. 393.

That case affords a striking illustration of what Judge Story so eloquently observes: "The beautiful character, pervading excellence, if one may so say, of equity jurisprudence, is, that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes": 1 Story's Eq. Jur., sec. 439. And Lord Cottenham frequently laid down the rule that it was the duty of a court of equity to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which . . . must continually arise, and not from too strict an adherence to forms and rules, established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy": *Taylor v. Salmon*, 4 Mylne & C. 141; *Mare v. Malachy*, 1 Id. 559; *Wallworth v. Holt*, 4 Id. 619.

Now, if a court of equity, in order to protect one class of trusts, creatures of its own creation, and by so doing to effectuate the intention of the author of the gift, can exercise its own inherent power to model and qualify an interest in equitable property without regard to the rules which the law has established for regulating the enjoyment of property in other cases, it is difficult to see why, with a like object in view, i. e., the effectuation of the gift just as its author intended it to be effectuated, such court may not lay down and declare a rule in such a case as this, which shall be equally effectual in preventing the intention of the donor from being thwarted,—a

rule which injures or defrauds no one, which violates no rule of public policy, and which gives stability and protection to a provision which, originating in the warmest ties of affection, seeks to afford to the beneficiary a sure and unfailing refuge against the vicissitudes of fortune.

If a court of equity, as already seen, will guard such a trust in one case with jealous solicitude, why should it fail to do so in another, in circumstances equally meritorious? No sound reason can be urged to support a negative answer to this question, unless that be deemed a good reason which is based upon some isolated technicality. But, as a general rule, a court of equity, in administering its peculiar jurisprudence, regards substance, not form, and refuses to be hampered by the narrow confines of technical formulas. Instances almost too numerous for computation are to be found in the books, where instruments, void and valueless at law, are held valid and enforced in equity.

Under the operation of the rule announced in *Brandon v. Robinson*, 18 Ves. 429, while a clause against alienation is held invalid, on the ground that a donor creating a life estate could not attach to his gift conditions forbidding its alienation, yet even by that rule, an equitable estate for life may be given, with a limitation over or a cesser to a third person, should the life tenant attempt to alien it or become bankrupt; or a donor can place his bounty beyond the reach of creditors by making it optional with the trustee whether he will pay the income to the beneficiary. In all these instances there is more or less restraint upon the right of alienation. The only effect of the English rule, where the instrument is drawn in accordance with it, and the terms of the instrument are not complied with, is, that the interest becomes forfeit, and so the creditors get nothing; and they get nothing, also, where there is a discretion as to payment lodged with the trustee. If this be so, it seems difficult to see why the founder of the trust may not do by a direct restraint upon alienation what he may indirectly do by another method. Sound reason would seem to maintain that such a distinction is too shadowy for a court of equity to follow, especially so, as by a direct restraint upon alienation the intention of the donor is effectuated, and by the indirect method his intention is frustrated and overthrown.

But whatever may be the view taken by the English courts on this question, some courts of the highest authority in this country maintain the opposite view, holding that those con-

siderations which apply to legal estates have no application where property is transferred in trust; as, in such instances, the trustee takes the whole property with the usual incidents of alienation, and in like manner, the beneficiary takes the legal title to the income when it is paid over to him, and therefore the point about restraints upon alienation has no foundation either in law or in fact. This is the position taken by the supreme court of Massachusetts, in a cause which was twice argued (*Broadway National Bank v. Adams*, 133 Mass. 170; 43 Am. Rep. 504), and the trust in that case, substantially identical with that one before us, held valid. Similar adjudications have been made in Pennsylvania, from an early period in its judicial history: *Thackara v. Mintzer*, 100 Pa. St. 151, and cases cited; and in other states: Vermont, *Barnes v. Dow*, 59 Vt. 530, and cases cited; Maryland, *Smith v. Towers*, 69 Md. 77. The two cases just cited are quite recent, the former having been decided in 1887, and the latter in June of the present year. The supreme court of the United States, in *Nichols v. Eaton*, 91 U. S. 716, has affirmed the validity of such trusts, and also in a subsequent case: *Hyde v. Woods*, 94 Id. 523.

The opposite view is taken in several states, and the authorities in support of that view will be found in the briefs of counsel. In some states, the validity of such trusts, where the fund proceeds from the bounty of another, is sanctioned by express statutes. This is true of New York, New Jersey, Illinois, and Tennessee. Decisions in those states, therefore, are of no value in the discussion of the question where such statutory provisions are not involved.

The judgment of the St. Louis court of appeals will be affirmed, and the cause remanded to that court, with directions to order the circuit court to dismiss the plaintiff's petition.

THE PRINCIPAL CASE IS ALSO REPORTED in 39 Alb. L. J. 66, and is cited and approved in *Partridge v. Cavender*, 96 Mo. 452. In the latter case, the testator devised his property to his son in trust for life, directing the trustee to pay the income to the devisee semi-annually, "on his personal receipt therefor, without his said son having any power to sell, assign, or pledge the same previous to the payment thereof to him," and such receipt should be the trustee's acquittance; and the court held that neither the income in the hands of the trustee nor the income to accrue could be assigned by the son or reached by his creditors, and that such limitation on the disposition of the income was valid. Generally as to attempts to restrain alienation, either of an income or land, by limitation in a will, see note to *Blackstone Bank v. Davis*, 32 Am. Dec. 242, 243; *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113, note 119; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269, note 285; see monographic note to *Smith v. Towers*, ante, p. 404.

TROYER v. WOOD.

[96 MISSOURI, 478.]

TAX SALE OF LAND of D. Troyer under execution in a tax suit against D. Tragar, in which notice was given the latter by publication, but no notice was given the former, is void as to him and his heirs, though it may appear from the recorded deed of the same land so sold that D. Tragar was the grantee therein.

G. S. Hoss, for the appellant.

E. E. Kimball, for the respondents.

SHERWOOD, J. Plaintiffs, the heirs of Daniel Troyer, deceased, brought ejectment for the northeast quarter of the southeast quarter of section 18, township 35, range 29. Petition in usual form; answer, a general denial. Plaintiffs proved themselves heirs of Daniel Troyer, deceased, and then showed a regular chain of title from the United States to Holbrook, Holbrook to Huselton, Huselton to Richardson, and Richardson to said Daniel Troyer. The deed from Richardson to Troyer was, however, entered on the records as being from Richardson to Daniel Tragar.

Defendant claims under tax proceedings, resulting in judgment and sale of the land in controversy, and through mesne conveyances from the purchaser at such sale, who received a sheriff's deed for the land aforesaid. The tax suit mentioned was instituted against Daniel Tragar. The circuit court was of the opinion that the tax proceedings were void, because of the insufficiency of the affidavit for publication, in that it alleged the non-residence of the defendant, Daniel Tragar, on "knowledge and belief."

Owing to views to be presently developed, it is unnecessary to discuss the sufficiency of that affidavit. For the purposes of this opinion, it may be conceded that every step taken in the tax suit against Daniel Tragar was regular and valid from inception to termination. It may also be conceded that, owing to the mistake made by the recorder in recording the deed from Richardson to Daniel Troyer, that deed was so recorded as to make it appear that Daniel Tragar was the grantee in such deed, and therefore, under the ruling in *Terrell v. Andrew County*, 44 Mo. 309, Tragar must be regarded as the record owner of the land in suit. It may also be conceded that under the ruling in *Vance v. Corrigan*, 78 Id. 94, a suit for back taxes is properly brought against the apparent, i. e., the record, owner of real property, and that such records

owner is to be treated as the true owner, and that a tax sale made against such apparent or record owner of the property will bind the true owner who claims under the apparent owner by unrecorded deed.

These concessions may freely be made, yet being made, how do they affect, or what bearing do they have on, the case at bar? These concessions and statements have been made in order to a full understanding of the precise *status* of the case in hand. But Daniel Troyer nor those who derive their title from him do not claim under Daniel Tragar, neither by unrecorded deed nor otherwise; they are not in privity with him either in blood estate or law, and consequently the principle announced in *Vance v. Corrigan*, *supra*, can have no application here: Bigelow on Estoppel, 3d ed., 284.

The only question, therefore, arising upon the foregoing facts is: What effect did the tax proceedings and judgment against Daniel Tragar have against Daniel Troyer? It is a principle of universal justice that no one shall be condemned in his person or property without notice, and opportunity to be heard in his defense. Notice is therefore essential to the jurisdiction of all courts; and the rule which requires that it be given to the party whose interests and rights are sought to be affected by judicial proceedings is as old as the law itself. A judgment without notice given, without opportunity to be heard, possesses none of the attributes of a judicial determination; it is simply judicial usurpation and oppression; a mere arbitrary edict, based upon an *ex parte* statement, and entered upon the records of the courts in defiance of the maxim, *Audi alteram partem*. Such a judgment deserves not the name it bears, and will not be respected and upheld in any forum where right and justice are administered. This doctrine is met with and approved at almost every turn you take in the broad fields of adjudication, and is announced by authorities too numerous for computation: *Nations v. Johnson*, 24 How. 203; *Walden's Lessee v. Craig*, 14 Pet. 154; *Webster v. Reid*, 11 How. 437; *Galpin v. Page*, 18 Wall. 350; *Windsor v. McVeigh*, 93 U. S. 274; *Earle v. McVeigh*, 91 Id. 503; *Pennyroyer v. Neff*, 95 Id. 714; *Rockwell v. Nearing*, 35 N. Y. 302; *Mason v. Messenger*, 17 Iowa, 261; Freeman on Judgments, 3d ed., secs. 117, 118, 495; *Hitchcock v. Aicken*, 1 Caines, 473; Blackwell on Tax Titles, 213.

But notice may be either actual or constructive, and the state possesses the power to substitute service by publication

in lieu of personal service; but such substituted service, when authorized or permitted by law, is as much an element of jurisdiction as is personal service where trial is the only method of service prescribed: *In re Empire City Bank*, 18 N. Y. 199. And proceedings *in rem* or *quasi in rem* are not exempt from the operation of the rule which makes service of notice in some form an essential of jurisdiction: Cooley's Constitutional Limitations, 2d ed., 498-500, and cases cited; Wells on Jurisdiction, sec. 88; Wade on Notice, 2d ed., secs. 1144, 1161; Waples on Proceedings in Rem, secs. 88, 570, et seq., and cases cited; *Woodruff v. Taylor*, 20 Vt. 65; *Denning v. Corwin*, 11 Wend. 647; *Freeman v. Thompson*, 53 Mo. 196, and cases cited.

Our statute in relation to proceedings where publication of notice is authorized as to non-resident or absent parties requires that the court or clerk "shall make an order directed to the non-residents or absentees notifying them of the commencement of the suit": R. S., sec. 3494. This section, of course, means that the names of such non-residents or absentees shall be specified in the order. In no other conceivable way could the order be "directed" to them. This view is enforced by section 3499, requiring certain things to be done where the names of parties whose interests are sought to be passed upon are "unknown" to the institutor of the suit. The name of such non-resident party, or the proper excuse for not giving it, is as essential to jurisdiction in any given case as is the description of the property sought to be affected by the proposed judgment or decree; and the necessity of such description will not be denied.

These premises being granted, it must needs follow that the judgment in the tax suit did not bind Daniel Troyer, as he was not a party thereto, and as he was not a privy in estate or otherwise with the defendant in such suit, the only rational conclusion which can be reached is, that as to him such judgment was a nullity, and has, as to him and his heirs, no binding force or validity: Wells on Res Adjudicata, sec. 28, and cases cited; Bigelow on Estoppel, 3d ed., 95 et seq.; Freeman on Judgments, 3d ed., sec. 162.

Therefore, the judgment of the circuit court, holding the tax-suit proceeding invalid as against plaintiffs, is affirmed.

JUDGMENT WITHOUT NOTICE, actual or constructive, is void, and a judgment for taxes is the same in effect as judgments in other actions: *Mayo v. Ah Loy*, 32 Cal. 477; 91 Am. Dec. 595. Therefore, notice of a tax sale to Henry S. Homer, who is neither the owner nor tenant, the land being assessed

and taxed to William S. Homer, renders the sale invalid: *Sargent v. Bean*, 7 Gray, 125, cited in *Blackwell on Tax Titles*, 5th ed., sec. 429. And so it was held, upon the authority of the principal case, in *Chamberlain v. Blodgett*, 96 Mo. 482, that a tax sale of the land of M. B. Millen, where the publication of the notice of the tax suit was to M. B. Miller, is void, and that it could make no difference, as against the grantee of the real owner, that Miller appeared on the county books as owner of the land. See note to *Carr v. Lewis Coal Co.*, 96 Mo. 149, *ante*, p. 333.

TAX TITLES. — A TITLE TO BE MADE UNDER A TAX DEED IS ONE STRICTI JURIS, and a strict compliance with the law must be shown: *Stillwell v. Brammell*, 124 Ill. 338. An affidavit of service of notice, to entitle the purchaser to a deed on a tax sale, must show the names of all persons in the actual possession of the land, the person to whom it was taxed, and the names of the owners and all parties interested in the premises, and the service of the proper notice on them: *Stillwell v. Brammell*, 124 Ill. 338. A tax deed executed in pursuance of laws of 1872, which fails to recite that the prescribed notice had been given, that payment had been made by the purchaser of the price bid for the land, that treasurer had made to the purchaser a certificate of the sale, and that such certificate had been presented to the county clerk for the purpose of obtaining a deed, is void upon its face, notwithstanding it asserts that the sale was begun and held in conformity with the provisions of law: *Duncan v. Gillette*, 37 Kan. 156.

CITY OF ST. LOUIS v. BELL TELEPHONE Co.

[96 MISSOURI, 628.]

CORPORATIONS. — **TELEPHONE COMPANY** incorporated under article 5, chapter 21, Revised Statutes of Missouri, has power to own and operate telephone lines, establish reasonable charges for the use of the same, erect poles along and across public roads and streets, and condemn private property for a right of way; but it is charged with the duty of receiving and transmitting messages with impartiality and good faith, and is subject to public regulations, including the right of the state to fix and prescribe a maximum rate for telephone service; and this power may be delegated to municipal corporations.

MUNICIPAL CORPORATIONS — POWERS. — Any fair, reasonable doubt concerning the existence of power in a municipal corporation is resolved against it, and the power denied. It only has such powers as are granted in express words, necessarily or fairly implied in or incident thereto, and those essential to its declared objects and purposes.

MUNICIPAL CORPORATIONS — POWER UNDER CHARTER. — Under its charter, the city of St. Louis has power to regulate the use of its streets, and this power extends to new uses as they come into existence as well as the uses common and known at the time the charter was granted. The erection and maintenance of telephone-poles is one of these new uses, and is a proper use of the streets which the city may reasonably regulate.

MUNICIPAL CORPORATIONS. — POWER TO REGULATE CHARGES FOR TELEPHONE SERVICE is neither included in nor incidental to the power granted the city of St. Louis under her charter to regulate the use of the streets.

MUNICIPAL CORPORATIONS—POWER TO REGULATE CHARGES FOR TELEPHONE SERVICE. — The charter of the city of St. Louis giving the mayor and assembly power “to license, tax, and regulate telegraph companies or corporations, and all other business, trades, avocations, or professions whatever,” makes telephone companies *ejusdem generis* with telegraph companies, though the former were not in existence at the date the charter was granted; but the power to “regulate” telephone companies does not confer the power upon the city to fix a rate of charges for telephone service by ordinance.

MUNICIPAL CORPORATIONS—POWER TO REGULATE TELEPHONE CHARGES. — Power granted to the city of St. Louis by her charter “to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient, in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures,” etc., does not include power to pass ordinances fixing rates for telephone services.

Hitchcock, Madill, and Finkelnburg, for the appellant.

Leverett Bell, for the respondent.

BLACK, J. This was a prosecution against the Bell Telephone Company of Missouri for the violation of an ordinance which provides that “the annual charge for the use of the telephone in the city of St. Louis shall not exceed fifty dollars.” A violation of the ordinance is made a misdemeanor, and subjects the offender to a fine of not less than fifty dollars nor more than five hundred dollars. The defendant appealed from a judgment assessing a fine of three hundred dollars against it.

The defendant is a corporation organized under article 5 of chapter 21 of the Revised Statutes of this state, and hence has all the powers therein conferred upon such corporations. Among others, they have the power to own and operate lines of telephone, to make such reasonable charges for the use of the same as they may establish, to erect their poles along and across public roads and streets, to condemn private property for a right of way, and they are charged with the duty of receiving and transmitting messages with impartiality and in good faith. The defendant neither affirms nor denies the power of the state itself to fix a maximum rate of charges, but does contend that no such power has been delegated to the city of St. Louis. The defendant’s property, consisting of poles, wires, fixtures, and the like, is, of course, private property; but the property is devoted to public use, and since the defendant has conferred upon it special franchises and privileges, including the right of eminent domain, the corporation is subject to public regulations; and we shall take it for

granted that the state has the power to fix and prescribe a maximum rate for telephone service.

That this power could be delegated to municipal corporations is equally clear. The ordinances of the city of St. Louis must not be in conflict with the general laws of the state. If the city has had this power to fix rates conferred upon it, then an ordinance which fixes reasonable maximum rates would not be in conflict with the law under and by virtue of which the defendant is organized, and which law constitutes its charter. A telephone company, when once its poles are planted and wires stretched on or over the streets of a city, becomes in effect a monopoly, and the company must submit to such reasonable regulations as the municipal corporation has power to prescribe.

The important question, then, is, whether the city of St. Louis has the power to enact the ordinance in question, the power to fix reasonable maximum charges for telephone service; and nothing to the contrary being shown in this case, it is assumed that the rate fixed is reasonable; so that the question is narrowed down to one of power on the part of the city to fix telephone rates at all. If the city has such power, it must be found in a reasonable and fair construction of its charter. Judge Dillon makes this full and comprehensive statement of the rule as to municipal powers: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied": 1 Dillon on Municipal Corporations, 3d ed., sec. 89; see also *St. Louis v. McLaughlin*, 49 Mo. 562. The rule, as before stated, is in accord with what we said in *City of St. Louis v. Herthel*, 88 Id. 128.

The city places some reliance on its general power to regulate the use of the streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation: *Ferrenbach v. Turner*, 86 Mo. 416; 56 Am. Rep. 437. The erection and maintenance of telephone poles is one of these new uses; and is a proper

use of the streets: *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258; 57 Am. Rep. 398. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant.

Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground.

By the fifth subdivision of section 26, article 8, of the charter of St. Louis, the mayor and assembly have power "to license, tax, and regulate lawyers, doctors, etc., telegraph companies or corporations, etc., and all other business, trades, avocations, or professions whatever." Telephone companies are not mentioned, though a vast number of trades, professions, and avocations are specified. They are not mentioned in all probability because not existing at the date of the charter. In construing this paragraph of the charter, we held in the case of *City of St. Louis v. Herthel*, *supra*, that architects were, for purpose of construction, *ejusdem generis* with lawyers, doctors, dentists, and artists, and therefore included by the general concluding words. So in this case it may with equal propriety be said that telephone companies are *ejusdem generis* with telegraph companies, and therefore included in the words of the general concluding clause.

It can make no sort of difference that these telephone companies were not in existence at the date of the charter. One of the objects had in view by the use of the general clause was to provide for just such cases. As aptly observed in that case (*City of St. Louis v. Herthel*, *supra*), "we are to construe it [the charter] according to the intent of the framers, and that intent must be gathered from the language and object of the charter provisions, and giving that language an interpretation neither strict nor strained."

Does, then, the power to regulate telephone companies, when that term is coupled with the powers to license and tax, give the city the power to regulate the charges for telephone service? By the general statutes of Massachusetts of 1860, page 167, it is provided that the mayor and aldermen of any city may make rules and orders for the regulations of carriages, and may receive one dollar annually for each license granted

to a person to use a carriage in the city. Under this power, it was held in *Commonwealth v. Gage*, 114 Mass. 328, that a city might fix the compensation to be charged by hackney coachmen. That case would at first seem to furnish some authority for the claim made by the city in this case. Turning to other provisions of the charter, however, we find that express power is given to establish ferry rates; to fix the rates for carriage of persons, and of wagonage, drayage, and cartage of property; to regulate the price of gas, and to regulate and control railways within the city as to their fares, hours, and frequency of trips. These express powers to fix prices, fares, and charges in these specified cases are followed by no general words. With this specific enumeration of cases, where the city may regulate the compensation to be charged, it impliedly appears that such a power was not intended to be given in other cases. This conclusion presents itself with more force when we see that, by the clause before quoted, the city has power to license, tax, and regulate private carriages, omnibuses, carts, drays, and other vehicles; so that the framers of the charter did not regard the power to license, tax, and regulate sufficient to give the power to fix rates and charges.

The power to "regulate," it may be conceded, gives the city the right to make police regulations as to the mode in which the designated employment shall be exercised: 1 Dillon on Municipal Corporations, sec. 358. But taking these charter provisions together, we think it would be going to an extreme length to say that they confer upon the city the power to fix telephone rates. If it has power to do this, it may also fix the charges for telegraph services, and for the other designated services which are of a public character. We conclude that the city has no power to pass the ordinances in question by reason of any of the charter powers before considered.

This brings us to the general welfare clause, which is in these words: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient, in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same by fines," etc. Sometimes the power to enact ordinances is given in general terms, and in other cases there is a specific enumeration of the powers. "This difference," says Dillon, "is essential to be observed, for the power which the corporation would

possess under what may be termed the 'general welfare clause,' if it stood alone, may be limited, qualified, or when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made": 1 Dillon on Municipal Corporations, 8d ed., sec. 315.

Under a general power like the one now in question, this court has held that the city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, and prohibiting cruelty to dumb animals: *St. Louis v. Schoenbush*, 95 Mo. 618, and cases cited. These matters are all police regulations, strictly speaking, and naturally fall within the domain of municipal legislation and regulation. To say that under this general power the city may fix rates for telephone services would be going entirely too far. This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges. What has been said in respect to the power to license, tax, and regulate applies with equal force here. We are not cited to, nor have we found, any adjudicated case which will support the ordinance now under consideration under the present charter powers of the city of St. Louis.

The judgment in this case is therefore reversed.

STATE HAS THE RIGHT TO PRESCRIBE the maximum rate which a telephone company may charge for the use of its telephones: *Hockett v. State*, 105 Ind. 250.

MUNICIPAL CORPORATION HAS ONLY SUCH POWERS as are expressly granted, and such as are necessary to carry into effect those specially conferred, and such powers are strictly construed: Note to *McCord v. Pike*, 2 Am. St. Rep. 92; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124.

FITZGERALD v. BARKER.

[96 MISSOURI, 661.]

NEGOTIABLE INSTRUMENTS — ACTION BY INNOCENT HOLDER. — A grantee who, when he takes his deed, assumes the payment of certain notes against his grantor cannot defeat an action on them by an innocent holder by alleging fraudulent misrepresentations and concealments by the grantor as to encumbrances which wholly defeated the title, in the absence of proof showing that such holder was in any way connected with the alleged fraudulent misrepresentations made by the grantor.

NEGOTIABLE INSTRUMENTS — INNOCENT PURCHASER BEFORE MATURITY. — A purchaser of notes before maturity is presumably an innocent pur-

chaser, and he cannot be prejudiced nor his title invalidated by subsequently learning that the maker thereof has been a fraud-feasor.

NEGOTIABLE INSTRUMENTS — EVIDENCE. — Where, in an action between the same parties on a note similar in all respects to one already paid, it is proposed to have defendant state the circumstances under which the first note was paid, the relevancy of such testimony must first be shown, or it will be presumed that the court committed no error in rejecting it.

NEGOTIABLE INSTRUMENTS — BONA FIDE PURCHASER. — One who takes a note before maturity, without notice, and in absolute payment of an antecedent debt, is regarded as a *bona fide* purchaser for value, though the debt discharged is but a simple contract debt, and no security is surrendered.

PLEADING AND PRACTICE — ERROR WITHOUT PREJUDICE. — Erroneous instructions against the party appealing will not work a reversal of the judgment when the proper determination is reached, notwithstanding the instructions.

Taylor and Pollard, for the appellant.

George A. Castleman, for the respondent.

SHERWOOD, J. This cause comes here on appeal, and for the third time: 70 Mo. 685; 85 Id. 13. The petition alleges that on November 2, 1872, John S. Thomas and wife conveyed to defendant certain real estate by warranty deed, wherein they covenanted to warrant and defend the title to said premises against the lawful claims of all persons whomsoever, except against the following-named deed of trust and notes on said property, to wit: two notes of two thousand dollars (\$2,000) each, payable two years after date, and eight interest notes for one hundred dollars each, payable respectively at six, twelve, eighteen, and twenty-four months after date, all of said notes being made by said John S. Thomas, and payable to his own order (which said defendant assumed and agreed to pay), and the taxes for 1873, said assumption and agreement being duly incorporated in said deed.

Plaintiff, at the date of said deed, was the holder and owner of one of said two-thousand-dollar notes, and the four interest notes thereon, payable, respectively, in six, twelve, eighteen, and twenty-four months from date, all said notes bearing date November 1, 1872, and bearing interest after maturity at ten per cent per annum. Defendant accepted said deed, and entered into possession of said property thereunder and thereby, and by virtue of said assumption and agreement and assignment thereby to plaintiff, became liable to pay said several notes to plaintiff as the holder thereof as they severally fell due. The first of said interest notes was duly paid by defendant to plaintiff at maturity thereof, but the residue remains

in his hands unpaid; but although said two-thousand-dollar note and said three interest notes, due, respectively, in twelve, eighteen, and twenty-four months, have been long since due, yet they and each of them remain wholly unpaid. Wherefore plaintiff prays judgment for the amount of said two-thousand-dollar principal note, and said three unpaid interest notes due at twelve, eighteen, and twenty-four months from date, with interest and costs.

By his answer, the defendant admits that on the second day of November, 1872, John S. Thomas and wife, by their deed of that date, conveyed to this defendant the real estate in said petition described by warranty deed, and that said deed contained an assumption of two notes of two thousand dollars each, executed by John S. Thomas, and eight interest notes of one hundred dollars each; but defendant denies each and every other allegation of the petition. For a further and special defense, the answer sets up that Thomas made fraudulent misrepresentations and concealments as to certain mechanics' liens and deeds of trust, which were not recited in the deed from Thomas to Barker, and by such misrepresentations Barker was induced to accept such deed in settlement of a demand he held against Thomas; "that plaintiff knew of and was privy to said false and fraudulent representations"; that defendant never learned of the falsity of such representations till early in 1873; and that the property conveyed was thereafter sold under the mechanic-liens judgment; and that the title as conveyed by Thomas to defendant was wholly defeated thereby. Plaintiff's reply was a general denial.

1. There is not a particle of evidence in this record tending to show that plaintiff was in any way concerned in the alleged fraudulent representations made by Thomas. This being true, it is useless to inquire what frauds Thomas practiced, or what misrepresentations he made as to the non-existence of other encumbrances or liens, since plaintiff had no part or lot in that matter.

2. The testimony shows that he was the purchaser, before maturity, of the notes in suit, and therefore, presumably, the innocent purchaser, and as a result of a purchase in such circumstances, he could not be prejudiced nor his title invalidated by subsequently learning that Thomas had been a fraud-feasor: *Hagerman v. Sutton*, 91 Mo. 519; *Leavitt v. La Force*, 71 Id. 353.

3. For this reason, the trial court very properly refused to

permit the defendant, who had testified to the payment of the first interest note to plaintiff, "to state the circumstances concerning the payment of that note." The very payment of that note was an acknowledgment by defendants that it was due plaintiff, and if there was anything which then transpired, any admissions made by plaintiff, either tacit or express, tending to show complicity between plaintiff and Thomas in hoodwinking defendant, it was the duty of the latter's counsel to make it known by showing the relevancy of the proposed testimony. This not having been done, the usual presumption which attends the acts and doings of courts of justice must prevail here; for such courts cannot be convicted of error upon mere surmise or conjecture: *Aull Savings Bank v. Aull*, 80 Mo. 199; *Bank of Pleasant Hill v. Wills*, 79 Id. 275; *Howell v. Stewart*, 54 Id. 400; *Cooney v. Murdock*, 54 Id. 349; *State v. Douglass*, 81 Id. 231; *Stone v. Leland*, 82 Id. 260; *Jackson v. Hardin*, 83 Id. 175.

4. But it is insisted that plaintiff is not an innocent purchaser in that he did not pay cash for the notes, but only took them on account of an old debt due him by Thomas. The testimony shows that plaintiff took the notes in part satisfaction of a much larger debt, and also released valuable liens which he held on the property of Thomas, and that the latter, on this consideration, transferred to him the notes, and promised to pay some money besides, but never did. The point whether a transferee of notes in such circumstances, who takes them before maturity, without notice, and in absolute payment of an antecedent debt, is to be regarded in the same light as one who pays cash for them in the ordinary commercial way, has, it seems, never been directly adjudicated by this court, though it was intimated in *Hodges v. Black*, 76 Mo. 537, affirming the judgment of the St. Louis court of appeals in the same cause (8 Mo. App. 389), that the correct rule in such cases is that such a transferee is to be regarded as a *bona fide* purchaser for value, in the ordinary acceptation of the term, though the debt discharged be but a simple contract debt, and no security be surrendered. In an earlier case in this court, a similar intimation was given: *Goodman v. Simonds*, 19 Mo. 106. This is believed to be the true rule, and is certainly supported by sound reason and ample judicial authority. This has long been the view taken by the supreme court of the United States: *Railroad Co. v. National Bank*, 102 U. S. 14, and cases cited; and it is the principle asserted

in most of our sister states, in England, and by the text-writers: 1 Daniel on Negotiable Instruments, 3d ed., secs. 827 et seq., and cases cited; 3 Kent's Com., 13th ed., 81; Story on Bills, sec. 183; Story on Promissory Notes, sec. 186; 1 Parsons on Notes and Bills, 221, and cases cited.

In the circumstances presented by the case at bar, the plaintiff would be regarded as a holder for a valuable consideration, and therefore not subject to precedent equities of which he was unaware, even in New York (*Phœnix Ins. Co. v. Church*, 81 N. Y. 218; 37 Am. Rep. 494), whose adjudications upon commercial paper differ, in some respects, from those of the supreme court of the United States, as well as from those of many state courts: 1 Daniel on Negotiable Instruments, sec. 831 c. Following this line of authorities, it must be held that the plaintiff's title is as free from flaw as if he had purchased in open market, and in the usual course of trade. Since writing the above, my attention has been called to several cases in this court where the holder of negotiable paper, taken prior to maturity as collateral security for a pre-existing debt, will hold such collateral free from equities: *Boatman's Savings Institution v. Holland*, 38 Mo. 49; *Deere v. Marsden*, 88 Id. 512; *Crawford v. Spencer*, 92 Id. 498; 1 Am. St. Rep. 745. Of course, the principle announced in those cases necessarily dominates this one.

5. It is also urged as a ground of reversal that the trial court erred in giving and refusing instructions. This, for argument's sake, may be conceded; but the proper determination to be made of this case is not in the least affected thereby, because, under the foregoing remarks, as plaintiff is to be regarded as a *bona fide* holder of the notes, all other questions are subordinated to that one, and the trial court would have been fully justified in directing a verdict for the plaintiff. This being the case, it is quite immaterial what the instructions were, so long as the jury found the only verdict they could have found consistent with the evidence. And this court is expressly forbidden to reverse the judgment of any court, unless we believe error was committed against the party appealing, and "materially affecting the merits of the action": R. S., sec. 3775.

Therefore, judgment affirmed.

ONE WHO TAKES NEGOTIABLE PAPER in payment of an antecedent debt before maturity, and without notice of any defect therein, becomes a holder for value, entitled to enforce payment without regard to the defenses that may

exist between other parties to the paper: *Tabor v. Merchants' National Bank*, 48 Ark. 451; 3 Am. St. Rep. 241, note 245; *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477, note 486.

INSTRUCTIONS, THOUGH ERRONEOUS, if they work no injury, will not justify a reversal: *Merchants' etc. Co. v. Block Brothers*, 86 Tenn. 392; 6 Am. St. Rep. 847; *Matter of Smith*, 4 Nev. 254; 97 Am. Dec. 531, note 540; *Hathaway v. Henderson*, 39 Kan. 687; *Winter v. Central etc. R'y*, 74 Iowa, 448; *Hare v. Pottawattamie etc. Co.*, 74 Id. 39; *Dickens v. City of Des Moines*, 74 Id. 217.

PROMISSORY NOTE—FRAUD—INNOCENT PURCHASER AFTER MATURITY. — Where holder of promissory note is induced by fraud, and without consideration, to indorse and deliver the same to another, who, after maturity, indorses it to an innocent purchaser for value, and without notice, the latter takes title, the original holder being estopped as against him to deny the title of the fraudulent indorsee: *Moore v. Moore*, 112 Ind. 149.

STATE v. DIERBERGER.

[93 MISSOURI, 663.]

ARREST—POWER OF OFFICER. — An officer who has been duly appointed, but who has not taken his oath of office, nor recorded his appointment, has the right, not only to command the peace, but to enforce it, and to arrest any one committing a breach of the peace in his presence.

ARREST. — FORCE WHICH OFFICER MAY EXERCISE in making an arrest is such as is necessary to overcome all resistance, even to the taking of the life of the party resisting, or one aiding or assisting him; and if the officer uses no more force than is reasonably necessary to make the arrest, he is not guilty of any crime.

ARREST. — BURDEN OF PROOF ON STATE to show unnecessary force by officer making arrest. Where an officer is on trial for murder in making an arrest, the burden of proof is on the state to show that the officer resorted to extreme and unnecessary force in seeking to make the arrest.

MURDER. Defendant had been duly appointed a deputy constable, but had not taken the oath of office nor filed his appointment at the time of the killing. Plea, not guilty, and justifiable homicide in seeking to make an arrest.

C. P. and J. D. Johnson, and Smith, Silver, and Brown, for the appellant.

B. G. Boone, attorney-general, for the state.

BLACK, J. The defendant stands convicted of murder in the second degree. This case was here before, and reference is made to the opinion of the court in 90 Mo. 369, for a general statement of the evidence. The contention now is, that the instructions given do not present the law fairly appli-

cable to cases where an officer kills one who is resisting an arrest.

John Horne, the deceased, and Joseph Jackson went to the front platform of the horse-car, and there got into an altercation with the driver, which resulted in a scuffle, or, as most of the witnesses say, a fight. The conductor opened the front door, and they fell into the car. Defendant, in the mean time, went to the front to check up the car, which was going down grade at a rate of speed dangerous to the passengers. The driver returned to his post, and defendant returned to the inside of the car, and addressing himself to Jackson, said: "I am an officer, and I will arrest you," or "If you don't keep quiet, I will arrest you." At the same time, he caught Jackson by the lapel of his coat. Jackson said: "If you are an officer, I will go with you." Horne, the deceased, said: "No, Jackson; he is not an officer, and he can't arrest you; and I don't give a d——n whether he is an officer or not, he can't take you." Jackson said: "All right; I won't go with him." Defendant then took out his pistol, and held it up. Thus far there is no substantial conflict in the evidence.

Mrs. Horne, widow of John Horne, testified: "The conductor told defendant to put up his pistol; he then caught hold of my husband, and forced him to the front, down, and half off of the seat; defendant fired one shot through the window, and then put his arms around my husband's neck, and fired the fatal shot."

Carroll, the conductor, testified: "Told defendant to put up his pistol; he put down his arms; Jackson struck me, and I pushed him down; did not see Horne or defendant when the first shot was fired; they were separated and standing up when the defendant fired the second shot, which killed Horne; defendant then jumped off the car; I followed him, and he pointed the pistol at me."

The defendant was examined and cross-examined at great length, and his testimony is to the effect that when the conductor told him to put up the revolver, and when he was in the act of doing so, Horne, the deceased, rushed forward on him, and that both Jackson and Horne struck him about the same time, forcing defendant down in the corner of the car; that the fight continued from the inside of the car to its outside, and then back on the inside, and that the second shot was fired on the inside of the car when the defendant and the deceased were clinched. During the contest, the defendant

received a cut on the hand and one on the nose, both of which appear to have been inflicted with a sharp instrument; his face and eyes were badly bruised. There is much other evidence on the one side and the other; but enough has been given to show its general scope, and the different theories of fact.

The court told the jury that defendant was a peace-officer, and as such it was his right, not only to command the peace, but to enforce it, and to arrest any one committing a breach of the peace in his presence, and take him before the proper officer, to be dealt with according to law. This direction is correct so far as it goes; but it should go further, and state that defendant's authority to so act was the same as if he had taken an oath of office, and registered his appointment.

This instruction goes on to say: "In doing this, he was authorized to use such force as was necessary to overcome all resistance, even to the taking of life; but while he was clothed with this authority, it was his duty to so conduct himself as to prevent, and not provoke, a breach of the peace; nor had he the right to assault any one engaged in a breach of the peace simply to punish him for what he might deem a violation of the law or an insult to him; nor had he the right as a peace-officer to resent an insult conveyed by mere words. And in making an arrest for a breach of the peace, or preventing a breach of the peace, he was justified in repelling force by force until his object was accomplished; but in such case, he had no right to resort to the use of a deadly weapon, except in the necessary defense of his life or himself from great personal injury."

The first portion of this branch of the instruction presents the law favorably enough for the defendant. The latter part, however, nullifies the first part. The instruction, taken as a whole and applied to the evidence, makes the case on the part of the defendant stand on the ground of self-defense. This is made the more emphatic by subsequent portions of the instructions. It places an officer making an arrest on the footing of any other person who is assaulted. It is due to the trial court to say that it doubtless designed to so qualify the instruction as to make it conform with a remark made in *State v. McNally*, 87 Mo. 644. But the question is, Does this instruction present a correct exposition of the law?

Homicide is deemed justifiable when committed in the lawful defense of such person where there shall be reasonable cause to apprehend a design to commit a felony or to do some

great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished, or when necessarily committed in lawfully keeping or preserving the peace: R. S., sec. 1235. This statute is declaratory of the common law, and it at once makes a radical distinction between the two classes of cases.

"Homicides committed for the advancement of public justice are: 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. . . . But in all these cases there must be an apparent necessity on the officer's side, viz., that the party could not be arrested . . . unless such homicide were committed; otherwise, without such absolute necessity, it is not justifiable": 4 Bla. Com. 178.

As to arrests for misdemeanors and breach of the peace, "it is not lawful to kill the party accused if he fly from the arrest, though he cannot be otherwise overtaken, and though there be a warrant to apprehend him. . . . But, as in case of felony, so here, if the officer meets with resistance and kills the offender in the struggle, he will be justified": 1 East P. C. 302.

"Amongst the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons have authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making the resistance is unavoidably killed in the struggle, this homicide is justifiable,—a rule founded in reason and public utility, for few men would quietly submit to an arrest if, in every case of resistance, the party empowered to arrest were obliged to desist and leave the business undone": 1 Russell on Crimes, 9th Am. ed., 892.

Mr. Wharton says: "As a general principle, officers of the law, when their authority to arrest or imprison is resisted, will be justified in opposing force to force, even if death would be the consequence; yet they ought not to come to extremities upon every slight interruption without a reasonable necessity. If they kill where no resistance is made, it will be murder; and the same rule will exist if they should kill a party after

the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to cool": 1 Wharton on Criminal Law, 8th ed., sec. 402.

"When, as a general proposition, one refuses to submit to an arrest after he has been touched by the officer, or endeavors to break away after the arrest is effected, he may lawfully be killed, provided this extreme measure is necessary": Bishop on Criminal Law, sec. 647.

"In misdemeanors and breaches on the peace, as in cases of felony, if the officer meets with resistance, and the offender is killed in the struggle, the killing will be justified": Id., sec. 650.

Other text-books and cases are to the same effect, but we refrain from making further quotations, and simply cite Foster, 272; 7 Bac. Abr. 209; 4 Stephen's Commentaries, 98; and Barbour's Criminal Law, 35.

These authors, ancient and modern, lay down the law in substantially the same terms. They show that the protection which an officer is entitled to receive is a different thing from self-defense. The officer, when making an arrest, may, of course, defend himself, as may any other person who is assaulted; but the law does not stop here. The officer must of necessity be the aggressor; his mission is not accomplished when he wards off the assault; he must press forward and accomplish his object; he is not bound to put off the arrest until a more favorable time. Because of these duties devolved upon him, the law throws around him a special protection. As we said in the recent case of *State v. Fuller*, 96 Mo. 165, his duty is to overcome all resistance and bring the party to be arrested under physical restraint, and the means he may use must be co-extensive with the duty.

The defendant was entitled to a plain instruction to the effect that he had a right, in endeavoring to make the arrest, to use all the force that was necessary to overcome all resistance, even to the taking of life, and if he used no more force than was reasonably necessary to then and there accomplish the arrest, then he should be acquitted. If the defendant attempted to arrest Jackson, and the deceased resisted the arrest, or aided and assisted Jackson in resisting the arrest, then deceased occupied no better ground than Jackson himself.

The evidence in this case does not tend to make out a case of deliberate killing, and there is therefore no use of encum-

bering the trial with instructions upon murder in the first degree.

The instruction as to murder in the second degree, among other things, states in substance that if defendant shot Horne, he is guilty of murder in the second degree, in the absence of proof to the contrary, and that it devolves upon defendant to repel that presumption, unless it is repelled by evidence offered by the state. Like instructions have been approved where there was evidence of justification for the killing when accompanied with an instruction as to reasonable doubt as to the whole case: *State v. Alexander*, 66 Mo. 148; but disapproved when not accompanied with a full instruction as to reasonable doubt: *State v. Wingo*, 66 Id. 181; 27 Am. Rep. 329.

Now, in this case, the defendant is guilty of no offense unless he resorted to extreme and unnecessary measures, — unless he shot Horne when there was no reasonable necessity for so doing, in order to accomplish the arrest; whether he did resort to such extreme measures is the very first issue in this case. The burden of proof of this issue is on the state. Whilst in general it is perhaps proper enough to say that from the simple act of killing the law will presume that it was murder in the second degree, still we think such an instruction should not be given in this case. The case starts out with evidence tending to repel the presumption, namely, that defendant was an officer; that he attempted to arrest Jackson, and that Horne interfered. The issue should go to the jury on all the evidence, and not be divided up with presumptions. As before stated, the burden of proof is on the state to show the use of extreme measures, and in order to determine this, it is necessary to look to all the circumstances surrounding the killing.

Since the killing in this case was intentional, it is one of justifiable homicide, murder in the second degree, or manslaughter in the second degree under section 1243, or in the fourth degree under section 1250: *State v. Edwards*, 70 Mo. 480; *State v. Curtis*, 70 Id. 600; *State v. Watson*, 95 Id. 412. Section 1243 seems to apply to those cases of unnecessary killing where the person killed was attempting to commit a felony or do some unlawful act, and the killing occurred after the attempt had failed. Here the resistance to the arrest seems to have been one continuous struggle up to the time the second shot was fired; and we cannot see that it comes within that section. If the defendant is guilty of manslaughter, it is because of an intentional killing, but without malice afore-

thought, and is manslaughter in the fourth degree under section 1250. We are, of course, not to be understood as saying that intentional killings only are included in that section.

The judgment is reversed, and the cause remanded for new trial.

ARREST — WHAT FORCE AN OFFICER MAY USE IN MAKING AN ARREST:
Note to *Hawkins v. Commonwealth*, 61 Am. Dec. 161-164; *State v. Pugh*, 101 N. C. 737; ante, p. 44; *Oreighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143, and note 147.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

BALTIMORE AND OHIO R. R. Co. v. KANE.

[69 MARYLAND, 11.]

RAILROADS. — ATTEMPTING TO BOARD A TRAIN AT A PLACE OTHER THAN THE PLATFORM PROVIDED FOR THAT PURPOSE IS NOT NEGLIGENCE if the company was in the habit of receiving passengers at other points, or if, on the occasion in question, its servants invited or directed the person injured to board the train at the place where his attempt was made.

RAILWAY COMPANY DESIRING TO PROHIBIT THE BOARDING OF ITS PASSENGER TRAINS ELSEWHERE THAN AT ITS PLATFORM should give notice to that effect; and one cannot be charged with negligence in attempting to board a train, unless he knows of such prohibition, or ought to have known of it, either from its publicity, or from the condition of the place where he attempted to enter.

ONE WILL BE PRESUMED TO BE AN OFFICER OF A RAILWAY COMPANY WHO WEARS ITS UNIFORM IN ITS DEPOT, and there assumes to give information about trains, and directions to intending passengers as to the train which it was proper for them to take.

QUESTION OF NEGLIGENCE OUGHT NOT TO BE TAKEN FROM THE JURY, UNLESS THE CONDUCT OF THE PLAINTIFF RELIED UPON AS CONTRIBUTORY NEGLIGENCE is established by clear and uncontradicted testimony, and presents some decisive act in regard to the character and effect of which no room is left for ordinary minds to differ.

ATTEMPT TO ENTER A MOVING CAR IS NOT, PER SE, CONTRIBUTORY NEGLIGENCE, irrespective of the rate of speed at which it is moving. All the circumstances must be taken into consideration. One prominent fact should not be considered to the exclusion of all the other circumstances.

ACTION by Mrs. Kane and her husband to recover compensation for injuries suffered by her in attempting to board a train of defendant's cars. The court, at the request of the

plaintiffs, instructed the jury as follows: "If the jury believe that the plaintiff Florence Kane was in possession of a ticket entitling her to ride over defendant's road from Curtis Bay to Baltimore, and that, with the purpose of returning to the city, she went with her husband and child to the station at Curtis Bay about eight o'clock, P. M., on the 18th of July, 1886, and that they found a train standing at the station, which was so filled that they could not get on it, and which extended the whole length of the platform adjoining the station; and that the plaintiff and her husband were informed by one of the officials of defendant in the uniform of the company, and apparently having official connection with the running of the trains, that there would be another or extra train in about ten minutes, and that in a few minutes another train did appear, coming from the direction of Baltimore, which passed the standing train by a siding, and ran to a position some distance in rear of the standing train (if they find such fact); and that the plaintiff and her husband were again told by the same person in the uniform of the company, 'There's your train, you had better go and get in it if you want seats,' or words to that effect; and that thereupon the plaintiff, with her husband and child, walked from the station with a large crowd of people along and over a board walk or platform by the side of defendant's track until they came alongside the extra or special train, and to a point where it was usual for people to board said train on similar occasions when a train was standing at the station (if they find such fact); and that the plaintiff Florence Kane, while trying to get aboard said train after it had stopped, was thrown from the step of the platform of a car and injured by the cars being suddenly put in motion; and that the injury to her resulted directly from the want of ordinary care and prudence on the part of the agents of the defendant, and not from the want of ordinary care and prudence on the part of the plaintiff contributing to the accident,—then the plaintiff Florence Kane is entitled to recover for the injuries sustained, and such physical and mental suffering as they may find she endured in consequence thereof; and the jury are instructed that what is meant by ordinary care and prudence on her part is such care and prudence as an ordinarily prudent person would exercise under like circumstances." To this instruction the defendant reserved its exception, numbered 9. The court gave the instructions asked by defendant, numbered 3, 4, and 5½, as

follows: "3. If the jury find, from the evidence in the case, that the accident complained of was in any degree owing to the want of due care and caution, at the time of the accident, on the part of Mrs. Kane, directly contributing thereto, then their verdict must be for the defendant. 4. If the jury shall believe, from the evidence, that the accident was directly caused by the concurrent negligence of the plaintiff and the said defendant, and that it would have been avoided by due and proper care on the part of either said plaintiff or said defendant, then their verdict must be for the defendant, without regard to whose negligence was the greater. 5½. If the jury shall find from the evidence that there was negligence on the part of the defendant's agents in the management of the train which caused the accident complained of, but shall further find that there was a want of prudence and proper care on the part of Mrs. Kane, in attempting to get on the cars at the place or at the time when she did, and that such want of prudence and proper care on her part directly contributed to the accident, then the verdict of the jury must be for the defendant." But the court refused to give defendant's instructions numbers 1, 2, 5, 6, 6½, 7, and 8, as follows: "1. That there has been no evidence produced in the case legally sufficient to show that the accident to the plaintiff was directly caused by the negligence of the defendant, and the verdict of the jury must, therefore, be for the defendant. 2. That the plaintiff is not entitled to recover in this action, because the undisputed evidence shows that the negligence and want of care on the part of the plaintiff Florence Kane directly contributed to the accident complained of, and the verdict of the jury must be for the defendant. 5. If the jury shall believe from the evidence that the defendant, for the use of persons desiring to enter its cars at Curtis Bay, had designated a specific place for its trains to stop for passengers, and had constructed thereat a safe and sufficient platform and station shed; and shall further find that on the evening of the accident, a train was obliged, in order to reach the said platform, to go round by the siding mentioned in evidence to a point below the bath-house, and back up to said platform, and that while said train was still moving down towards said point, the said Florence Kane attempted to get upon said train, and in doing so, fell between the cars of said moving train, and was thereby injured,—then the plaintiff is not entitled to recover. 6. If the jury shall believe, from the evidence, that the defendant

company had established at Curtis Bay a recognized place for its trains to stop and take passengers, and had erected thereat a safe and commodious station shed and platform; and shall further find that the plaintiff Florence Kane, being anxious to get upon a train that had not reached the station before it should become filled, went down to a point where it was obliged to stop in order to back up to said station, and taking advantage of said stopping, attempted to get upon said train, and was hurt by the train suddenly moving,—then the plaintiff cannot recover for said accident, and their verdict must be for defendant. 6½. It is incumbent on the plaintiff to prove that the injury to Mrs. Kane was caused entirely by the negligence of the defendant or its agents; and if they shall find that the injury complained of was caused in part by the attempt of Mrs. Kane to get on the train at a place other than an established station of the defendant corporation, and before the train which she attempted to get on had stopped for the reception of passengers, then the verdict of the jury must be for the defendant. 7. If the jury shall believe, from the evidence, that the trains of defendant always stopped at the regular station platform for passengers to get on, and that a safe and sufficient platform, and that there was nothing in the appearance of the track down by the bath-house to suggest that it was meant as a place for passengers to get on trains, and that no authorized agent for defendant gave any special invitation or permission to so use it; and shall further find that the natural and only method by which the second train could be brought up to the said platform was to go down to the track by the bath-house, and wait there until the first train had drawn out, and that this was the only purpose for which trains went down there; and shall further find that on the Sunday evening of the accident, a large number of people, anxious to secure seats in said train, endeavored to board said second train, both while it was coming down the siding and when it had come to a stop near the bath-house, in order to get on the train before those who waited for it to stop at the regular platform, and that it was while engaged in an attempt to get on the train under these circumstances, and as the direct result of that attempt, that plaintiff was injured,—then plaintiff cannot recover, even though the jury should believe that people in considerable numbers had, both on this evening and previous Sunday evenings, under the same circumstances, succeeded in getting on such trains

at this point before they reached the platform. 8. That there has been no evidence offered legally sufficient to show that any authorized agent of the defendant gave any special invitation or permission of the kind spoken of in defendant's seventh prayer." Verdict and judgment in favor of plaintiffs for \$8,750. Defendant appealed.

W. I. Cross and John K. Cowen, for the appellant.

David G. McIntosh and John J. Wade, for the appellees.

IRVING, J. This was an action brought by husband and wife for injuries to the wife, alleged to have been sustained by reason of the conduct and negligence of the employees of the appellant. The appellant contends that, upon the testimony of the appellees and their witnesses, such case was not made as to justify its submission to a jury. The consideration of this ground of complaint involves an examination into and analysis of the facts, as well as the incidental discussion of some questions of admissibility of some of the facts given in evidence.

The conceded facts are, that the appellant, on the occasion of the injuries received by the appellee Mrs. Kane, was running, on a sabbath day, an excursion train on the Curtis Creek branch of its road; and that the plaintiffs, the appellees, were regular passengers on that day, not as excursioners, though they had excursion tickets, but as passengers to a point where they wished to visit a sick friend. The injuries sued for were received in an effort to board the train in the evening, for the purpose of returning to Baltimore city. About the circumstances attending this effort to board the train there is some conflict of evidence, but the correctness of the court's ruling in sending the case to the jury must depend on the testimony of the plaintiffs. There is no substantial disagreement as to the description of the *locus in quo* and the premises adjoining. There was a platform, at which a train of cars was standing and filled ready for return to Baltimore, when the plaintiffs left the platform and went to the place where the effort to get on another train was made, which resulted in the accident. At the platform was a shed for the shelter of passengers, and where these plaintiffs were, when they allege they were told by a railroad official to go down and take their train, which was at a point some distance away from the platform. Steps descended from the platform to a plank walk alongside the railroad track, and a few inches

higher than it, which plank walk led to the bath-house of this resort. Whilst the train which was filled stood at the platform making ready for departure, another train from Baltimore came down and passed by the standing train and the platform, and ran down towards the pier. The engine had to reverse by use of a "Y" to return to Baltimore. Before this train came, the plaintiffs, who had been unable to get seats on the train standing at the platform, were spoken to by a person wearing the uniform of the company (which uniform Mrs. Kane said she knew), who said to them that another train "will be along in ten minutes; we have telegraphed for an extra train," and invited them into the waiting-shed. When this promised train came by, the same individual, with the uniform of the company, who had invited them into the waiting-shed, came and said to them, "There is your train; go and get on it." The crowd was all moving in the direction of this train, and being so instructed by this person, they went with many others down the steps to the plank walk, and down it to the point where the attempt to board the train was made. When the train stopped, plaintiff's husband and child got on. The train again moved toward the pier, and stopped (as plaintiff and her witness say), when she, assisted by a man named Stout, tried to mount the steps. Stout says he had his hand under her elbow. She put her foot on the step and the car gave a jerk, and she was thrown off, and falling under the car, she was seriously injured,—one arm and the fingers of the other hand being cut off. The step of the cars, she says, was about eighteen inches from the plank walk. Mr. Stout says he thinks about two feet. Passengers were crowding in all along this plank walk; and the plaintiffs and their witnesses say they heard no direction not to board the train there or to desist; and said no effort was made to prevent its being done. Mr. Stout had immediately before assisted two ladies successfully in boarding the train there. After doing so, the train moved about the length of a car, and again came to a full stop, when he proceeded to assist Mrs. Kane. Although there was evidence from the defendant that the train never came to a stop, and was in actual motion when the effort to board the train was made, for the purpose of the ruling whether there was any evidence to take the case to the jury, we cannot consider that contradiction of the plaintiffs and their witnesses. There was evidence tending to show that on all such occasions passengers were in the habit of boarding the train, and

were allowed to do so, without objection from anybody, all along this plank walk wherever the train might happen to stop.

The appellants insist that, having provided a platform where the train regularly stopped, the plaintiffs had no right to get on at any other point, and that the attempt to do so was, in law, contributory negligence. Reliance for this contention is placed upon Thompson on Carriers of Passengers, 129, where it is stated, and authorities for it are cited, that when a safe and convenient means of getting off and on the cars has been provided, if a passenger uses a way of his own choice, he will be responsible for consequences. But clearly, this means that when the railroad recognizes that as the only place where passengers will be received or discharged, and has so ordered; for the same authority in the same connection says that "wherever a railroad company is in the habit of receiving passengers, whether at the station or some point outside, passengers have a right to assume that such parts of the premises are in safe condition for such purpose."

Of course, the platform provided by the company is the most suitable place for ingress and egress; but it does not follow that if the company's officers see a person getting on or off a train elsewhere than at the platform, his effort may be willfully or negligently disregarded to his injury. Here the passengers were allowed to enter from this board walk. There is evidence, at any rate, that way. The doors were not closed against them; and so far as the plaintiffs' evidence goes, there was no inhibition or effort to prevent it. Witnesses say that passengers entered the cars from this plank walk on all excursion occasions. In *McDonald v. Chicago etc. R. R. Co.*, 26 Iowa, 139, 96 Am. Dec. 114, Judge Dillon, speaking for the court, says: "If the train had arrived, was on the track, the car doors open, and if, as is frequently if not generally the case, passengers are allowed, or at least not forbidden, to enter the cars before they are drawn up in front of the station, we think a passenger may reasonably and properly make the attempt to reach and enter the cars, if he is not aware of any rule or regulation to the contrary; and if he receives an injury in so doing (he using proper care) from the unsafe and dangerous condition of the platform or the steps in a place where passengers would naturally go, the company is liable therefor." On page 142, the same distinguished judge says: "A railroad company has a right to require all passengers about

to enter their cars to do so only when the cars are brought up to the platform for that purpose. We cannot say that it is a rule of law that the mere existence of a platform in front of a depot is necessarily notice to the passenger that the train will be drawn up to that place to receive him, and that the company requires that he shall wait and enter the cars at that place, and is prohibited from entering them elsewhere. . . . Often, however, there is no such requirement, and passengers are allowed, or at least not forbidden, to enter elsewhere."

If the railroad company intended to prohibit an entrance elsewhere than at the platform in front of the station, notice to that effect should have been given; and these plaintiffs ought to have been shown to have known of such inhibition, or that they ought to have known it, if there were such prohibition, from the publicity of such notification, or from the condition of the place where they attempted to enter, and all the circumstances surrounding them. There is no pretense of any notice to them that passengers would be received at the platform in front of the station only, and were prohibited from attempting to enter at any other place. It was a good plank walk, elevated some inches above the track where they say the cars had stopped, and hundreds of people were being received into them there, or at least, not prevented or prohibited from entering, according to the plaintiffs' evidence. So that, apart from the alleged direction of an official to go and enter the car, there would seem to be strong authority for permitting this case to go to the jury. But certainly, if these plaintiffs were, as they testify they were, directed by a person wearing the uniform of the railroad company, and whom they justifiably supposed to be such officer, to take the train away from the platform, they were, in such case, justified in supposing they were not obliged to get in at the platform in front of the station; and that it was not against the company's rules to board the train where this attempt was made, and where so many others did enter the cars; and the railroad must be answerable for accidents resulting from the negligence of its officers in such case. The contention is, however, that the person so directing them is not proven to have been an officer of the company, and they were not justified in supposing him to be such officer; but we think that, as he wore the company's uniform, and said, "We have telegraphed for an extra train," and invited them into the waiting apartment, and then, as an officer, directed them, when the train came,

that this was their train, and "to go and take it," there was sufficient *prima facie* evidence to them that he was what he seemed to be. At such a moment, it hardly could have been expected or required of them to verify his authority by the testimony of anybody before they acted. It was certainly evidence to go to the jury; and it was entirely competent for the road to show the plaintiffs were mistaken, and that no such official was there; or to have shown that those who were there did not actually do or say what the plaintiffs say a seeming official did. It was a question for the jury whether there was such person in the uniform of the company who did give the directions testified to. If there was no such official, and no such directions from one, the jury could not find for the plaintiffs upon their first prayer. The witnesses may have been mistaken; but Mrs. Kane said she knew the uniform of the company, and this person wore it. The jury was the proper tribunal to decide whether this was so. We think there was no error in granting the plaintiffs' prayer, nor in rejecting the defendant's first and second prayers. In *McMahon v. Northern Central R'y Co.*, 39 Md. 449, this court said: "In no case ought the court to take the question of negligence from the jury, unless the conduct of the plaintiff, relied on as amounting in law to contributory negligence, is established by clear and uncontradicted testimony; and in the case of *Cumberland Valley R. R. Co. v. Maugans*, 61 Id. 61, 48 Am. Rep. 88, the court said, and if possible, more emphatically: "The case must be a very clear one to justify the court in taking upon itself the responsibility; it must present some decisive act in regard to the effect and character of which no room is left for ordinary minds to differ."

The plaintiffs' prayer put the case to the jury on the hypothesis that the effort to board the train was not made until the train came to a full stop, and embodied the circumstances as to time, place, etc., when and where the attempt to enter was made as they had testified to them, and was, we think, properly granted. The third, fourth, and fifth and a half prayers of the defendant put the question of the contributory negligence of the plaintiff very fully to the jury, and were granted. The third and fourth instructed the jury that if the accident was in any degree referable to the negligence or want of care of the plaintiff, they could not find for the plaintiff. Those instructions could hardly have been made more comprehensive except by the phraseology of prayer five and a half,

which says that though the jury might find negligence on the part of the railroad company, yet if they found "there was a want of prudence and proper care on the part of Mrs. Kane in attempting to get on the cars at the place or at the time when she did, and that such want of care and prudence on her part directly contributed to the accident, then the verdict of the jury must be for the defendant." This was certainly as far-reaching as the defendant could possibly ask. "At the place" had direct reference to the plank walk where the attempt was made, and "at the time" could only refer to the moment of the attempt as to whether the train was in motion when the attempt was made.

By these prayers, everything seems to have been submitted to the jury which could possibly affect the defendant's responsibility for the accident. Yet great stress is laid on the refusal of the court to grant the fifth prayer of the defendant. We can see no error in its rejection. It was clearly misleading. It assumes there was evidence that a place had been "designated" as the place for entering the cars, which implies an order, notice, or sign of which there was no evidence. The existence and use of the platform as one place of entry was all the proof about it. It asked the court to say, as matter of law, that the platform which was there was the only place where a passenger could justifiably attempt to enter the cars without any evidence of a rule of the company on the subject, and without reference to the knowledge or ignorance of the plaintiffs about it. It also wholly ignores the evidence tending to show a practice of receiving passengers all along this plank walk on excursion occasions, as well as the proof in this case of a person clothed and acting as an officer of the road directing these plaintiffs to enter where they did. It asks the court to say, as a matter of law, that this attempt to enter the car, if the car was in motion, was *per se* contributory negligence, and that the verdict must be for the defendant, without any qualification as to the speed or degree of motion, whether fast or very slow, — barely moving. This lady was, by the evidence, six months gone in pregnancy; but she was proven to be only twenty-eight years old, and was assisted by a man in her effort to get on board. Under such circumstances, if the train was moving very slowly, "ordinary minds might differ" as to the prudence or imprudence of the attempt. It would seem to be a question especially proper for the jury, and was committed to them by prayer five and a half. It

should be noted that an officer of the road testified to taking a lady badly afflicted with rheumatism to a point directly opposite to Mrs. Kane to help her into the train, on the side of the cars where there was no plank walk, and which was the lowest, and where the step was longer than from the plank walk; and while there the witness saw the accident.

If the train was in rapid motion, the danger would be obvious, and an effort to get off or on in such case has been decided, and with good reason, to be negligence in law; but as was said in Maugans's case, 61 Md. 61, there is "no general accord of judicial opinion on this subject"; and "the weight of authority is against the proposition that it is always, as matter of law, negligence and want of ordinary care for a person to get off from a car when it is in motion." The rule ought to be the same whether the effort be to enter or to alight.

The true rule, as established by Maugans's case, *supra*, is, that all the circumstances must be considered in order to determine whether there is contributory negligence; and that it "is not sound to select one prominent fact" as controlling to the exclusion of the rest. The physical condition of this lady was to be considered with reference to her age, and the fact that she was assisted by a man; the height of the step, and if the car was in motion, the rapidity of the motion were also facts bearing on the question of the propriety of her effort to get on, and were specially proper for a jury to weigh. We see nothing so distinguishingly and unquestionably hazardous as to require the court to say, as a matter of law, that the attempt was fatally contributory, as this prayer required the court to say.

What we have said respecting the prayers discussed disposes of the remaining prayers of the defendant, which, according to the views we have expressed, were rejected properly.

The first, second, third, fourth, fifth, sixth, seventh, and eighth exceptions relate to the admissibility of certain evidence tending to show a habit of receiving passengers along the plank walk, and elsewhere than at the platform. For the reasons and upon the authorities already cited in discussing other propositions, it is clear there was no error in those rulings. The motion in arrest of judgment was abandoned at the hearing.

Judgment affirmed.

NEGLIGENCE, WHEN A QUESTION OF FACT AND WHEN A QUESTION OF LAW: See note to *Mynning v. Detroit etc. R'y Co.*, 8 Am. St. Rep. 804; *City R'y Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798, and cases collected in note 801 and 802.

NEGLIGENCE. — SLIGHT CONTRIBUTORY NEGLIGENCE WILL NOT DEFEAT RECOVERY, IF EMPLOYEES of defendant were grossly negligent: *Wichita etc. R. R. Co. v. Davis*, 37 Kan. 743; 1 Am. St. Rep. 275, and note 279; *Lake Shore etc. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510, and note 524; note to *Harris v. Township etc.*, 8 Am. St. Rep. 842; *Ford v. Umatilla County*, 15 Or. 313.

NEGLIGENCE. — EFFECT OF INVITATION BY DEFENDANT OR HIS SERVANTS TO RIDE IN A DANGEROUS PLACE: *Lake Shore etc. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510, and note 523; *Mages v. Missouri etc. R'y Co.*, 92 Mo. 208; 1 Am. St. Rep. 706; *International etc. R. R. Co. v. Cook*, 68 Tex. 713; 2 Am. St. Rep. 521. Obedience by passenger to directions of conductor do not constitute contributory negligence, unless the danger was obvious: *Cincinnati etc. R'y Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144.

RAILWAYS. — Private rules and regulations of company must be brought to the notice of those sought to be bound thereby: *Lake Shore etc. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510; *Mages v. Missouri Pac. etc.*, 92 Mo. 208; 1 Am. St. Rep. 706.

SMITH v. TOWERS.

[69 MARYLAND, 77.]

A DEVISE OR BEQUEST OF A BENEFICIAL LIFE ESTATE, SO AS TO SECURE ITS ENJOYMENT TO THE BENEFICIARY, WITHOUT MAKING IT ALIENABLE BY HIM, OR SUBJECT TO THE CLAIMS OF HIS CREDITORS, will be respected by the courts of this state, and may be accomplished by a devise to F. of designated realty in trust to collect the rents and profits, and to pay the same to R., "into his own hands, and not into another, whether claiming by his authority or otherwise," and upon the death of R., to such of his children as may then be living.

ACTION by Smith and Son against Robert J. W. Garey and another, in which judgment was entered in favor of plaintiff. Under process issued for the enforcement of this judgment, William F. Towers was garnished for the purpose of reaching moneys in his hands as a trustee of the defendant, Garey. The trust had its origin in a devise made by the defendant's father, the terms of which are stated in the opinion. The trustee selected by the testator having died, the garnishee, Towers, had been appointed in his stead by the proper court. A *pro forma* judgment was entered in favor of the garnishee, from which the plaintiff appealed.

W. S. Bryan, Jr., for the appellant.

R. J. Jump, J. W. Bryant, and Edwin H. Brown, for the appellee.

ROBINSON, J. The testator devised certain real estate to his friend, John R. Fountain, in trust, to collect the rents and profits, and to pay the same to his son Robert, "into his own hands, and not into another, whether claiming by his authority or otherwise," and upon his death to convey said real estate to such children of his son Robert as may be living at the time of his death.

Upon the construction of this clause of the testator's will two questions arise: 1. Did the testator mean to give the income of the property to his son to the exclusion of his creditors? and 2. If so, are the terms and provisions of the will effectual to carry out this intention? There can be no difficulty whatever as to the first point. He not only gives the legal estate to the trustee, but he directs in express terms that he shall pay the income into the hands of his son, and not into the hands of any other person, whether claiming by his authority, or in any other capacity. Here, then, is an express provision, that the income shall be paid to his son, and an express prohibition against paying it to any other person. If the income in the hands of the trustee is liable to the claims of creditors, the trustee, it is plain, could not carry out the trust. So, construing this will as we do, and it is not, we think, susceptible of any other construction, the testator meant, beyond all question, that the income should be paid into the hands of his son, to the exclusion of all other persons, whether claiming as alienees or as creditors.

The next point is one of more than ordinary importance, and has not heretofore been decided by this court. A great deal may be said on both sides, and the question is not free of difficulty. In England, the decisions are all one way, and it is well settled there, that the devise of an equitable estate or interest for life to any person, other than a married woman, carries with it, as a necessary incident to such estate or interest, the right of alienation by the *cestui que trust*, and is liable for the payment of his debts, and no provision by way of inhibition or otherwise, which does not operate as a cesser or limitation over of the estate, can protect it against the claims of creditors: *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 480; *Graves v. Dolphin*, 1 Sim. 66; *Green v. Spicer*, 1 Russ. & M. 395; *Younghusband v. Gisborne*, 1 Coll. C. C. 400.

In this country, however, the decisions are conflicting, and the supreme court of the United States, and the supreme

courts of other states, have, after full consideration of the English cases, held that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to his beneficiary, without making it alienable by him, or liable in any manner for his debts, and that such an intention, when clearly expressed by the founder of the trust, must be respected by the courts. The supreme court, after reviewing the English decisions, in an able opinion by Justice Miller, say: "But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefit sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. . . . Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee": *Nichols v. Eaton*, 91 U. S. 725, 727.

And in the still later case of *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 500, argued in June, 1881, and reargued in March, 1882, the court unanimously held that property may be conveyed in trust, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cessor or limitation over of the estate in such an event. Morton, C. J., says: "We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. . . . Under our system, creditors may reach all the property of the debtor not exempt by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given."

And then, again, in *Rife v. Geyer*, 59 Pa. St. 393, Judge Sharswood, speaking for the court, says: "That a benefactor has the power of thus restricting the enjoyment of his bounty through

the medium of a trust during the life of the beneficiary is now the unquestionable law of this state." In *Shankland's Appeal*, 47 Id. 113, the point was expressly decided, and it was there held that a trust to collect and receive rents and pay over the same to a son of the testatrix for and during the term of his natural life, without being subject to his debts and liabilities, was an active one, and that the legal estate was vested in the trustee, and no act of the *cestui que trust* could deprive him of it, or allow him to interfere with the collection of the income, and no creditor could touch the income or any interest which the *cestui que trust* had in it.

In Vermont, Connecticut, and Kentucky, the highest courts have held that the income of property may be devised in trust for the benefit of the *cestui que trust* for life to the exclusion of the claims of his creditors: *Executors of White v. White*, 30 Vt. 338; *Leavitt v. Beirne*, 21 Conn. 1; *Pope's Ex'rs v. Elliott*, 8 B. Mon. 56.

In other states, however, and it may be said in the majority of the states where the question has arisen, the English rule has been adopted without qualification: *Tillinghast v. Bradford*, 5 R. I. 205; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *Heath v. Bishop*, 4 Rich. Eq. 46; *Bailie v. McWhorter*, 56 Ga. 183; *Rugely and Harrison v. Robinson*, 10 Ala. 702.

In this state, there is no decision to govern us, and with conflicting decisions in other courts entitled to the highest consideration, the question is one, after all, to be determined by us on principle. The English decisions rest on two grounds: 1. That the right of alienation is a necessary incident to an equitable estate for life, and any restraint upon this right is against the policy of the law, which favors the ready alienation of property; and 2. That public policy forbids that one should have the right to enjoy the income of property, to the exclusion of his creditors. Now, the right to sell and dispose of property is a necessary incident of course to the absolute ownership of such property. You cannot give to one a fee-simple interest, and then say he shall not sell or dispose of it, because the right to alien it is a legal and necessary incident to the estate granted, and to impose such a condition would be repugnant to the nature and tenure of the estate itself. And besides, the best interests of the public require that there should be a ready transmission of property. But the reasons on which the rule is founded do not apply to the transfer of property in trust. Where by the terms of the trust

the legal estate is vested in a trustee, he takes the legal title with the necessary incidents attached to it, and among such incidents is the right to alien it. The *cestui que trust* takes the equitable estate with the right to the accrued income, and when this has been paid to him, the absolute right to dispose of it. So neither the principal nor the income can be said to be inalienable. And besides, the policy of the law is not against all restraints on the absolute right to dispose of it. You may give one an estate for life, with a provision that the estate shall go over to a third person upon alienation, voluntary or involuntary, by the life tenant. You cannot give property to be held in perpetuity, but you may give one an estate for life, with a limitation over to lives in being, and twenty-one years thereafter. And so, by the English rule, you may give an equitable estate for life, with a limitation over or a cessor to a third person, should the life tenant attempt to alien it. Now, in all these instances there is a restraint to a greater or less degree on the right of alienation. The law does not therefore forbid all and any restraints on the right to dispose of it, but only such restraints as may be deemed against the best interests of the community. And the gift of an equitable right to the income from property for the life of the beneficiary, to the exclusion of his alienee, is not, in our opinion, repugnant to the estate or interest granted, nor is it such a restraint on the right of alienation as the law, for reasons of public policy, forbids.

And then as to the other ground, that it is against the policy of the law to permit one to hold and enjoy an estate or interest in property for life, whether legal or equitable, to the exclusion of his creditors. Now, common honesty requires, of course, that every one should pay his debts, and the policy of the law for centuries has been to subject the property of a debtor, of every kind which he holds in his own right, to the payment of his debts. He has as owner of such property the right to dispose of it as he pleases, and his interest is, therefore, liable for the payment of his debts. But a *cestui que trust* does not hold the estate or interest in his own right; he has but an equitable and qualified right to the property or to its income, to be held and enjoyed by the beneficiary on certain terms and conditions prescribed by the founder of the trust. The legal title is in the trustee, and the *cestui que trust* derives his title to the income through the instrument by which the trust is created. The donor or deviser, as the absolute owner

of the property, has the right to prescribe the terms on which his bounty shall be enjoyed, unless such terms be repugnant to the law. And it is no answer to say that the gift of an equitable right to income to the exclusion of creditors is against the policy of the law. This is begging the question. Why is it against the policy of the law? What sound principle does it violate?

The creditors of the beneficiary have no right to complain, because the founder of the trust did not give his bounty to to them. And if so, what grounds have they to complain because he has seen proper to give it in trust to be received by the trustee, and to be paid to another, and not to be liable while in the hands of the trustee to the creditors of the *cestui que trust*. All deeds and wills, and other instruments by which such trusts are created, are required by law to be recorded in the public offices, and creditors have notice of the terms and conditions on which the beneficiary is entitled to the income of the property. They know that the founder of the trust has declared that this income shall be paid to the object of his bounty to the exclusion of creditors; and if, under such circumstances, they see proper to give credit to one who has but an equitable and qualified right to the enjoyment of property, they do so with their eyes open. It cannot be said that credit was given upon such a qualified right to the enjoyment of the income of property, or that creditors have been deceived or misled; and if the beneficiary is dishonest enough not to apply the income, when received by him, to the payment of his debts, creditors have no right to complain because they cannot subject it in the hands of the trustee to the payment of their claims against the express terms of the trust. The hardship to them is one that will surely bring about its own remedy, for the dishonest beneficiary, it is plain, would soon be without credit. And then as to the rights of creditors, these may be defeated even according to the English decisions, by providing that, in the event of the recovery of a judgment against the *cestui que trust*, or upon his insolvency, his interest in the property shall cease, and shall go to another. Now, what advantage to the creditor is the cesser or limitation over? What he wants is the money due to him; and this is not paid by depriving the beneficiary of the property. But it may be said that, sooner than lose his interest in the property, self-interest, if no higher consideration, will prompt him to pay his debts. There is force in this; but

with the best intentions, any one may, by the chances and hazards incident to every pursuit in life, be unable to pay his debts; and in that event, by depriving one of his property by limitation over to a third person, you may deprive him of the very means by which he might, in the future, repair his fortune. So it does not seem to us there is any substantial advantage to the creditor in thus permitting the founder of the trust to do that indirectly which we think he can do directly. And then, again, by the English rule, the rights of creditors may be excluded by providing that the income may be paid or not to the beneficiary, at the option of the trustee. To impose a requirement so harsh in itself upon the bounty of a donor or deviser who may desire to provide for the certain support of the object of his bounty is not warranted, it seems to us, by any principle of justice or sound public policy. And a rule of law which requires this to be done, and one which may be evaded by carefully drawn terms and provisions, is hardly worth preserving. Upon principle, therefore, we are of opinion that the founder of a trust may provide in direct terms that his property shall go to his beneficiary to the exclusion of his alienees, and to the exclusion of his creditors. This being so, the rents and profits in the hands of the trustee, and which the testator in the will before us directs shall be paid into the hands of his son Robert, and "not into the hands of another, whether claiming by his authority or otherwise," cannot, in our opinion, be reached by his creditors by any process, either at law or in equity, before such rents and profits are paid to him.

Judgment affirmed.

IN A DISSENTING OPINION BY ALVEY, C. J., in which Bryan, J., concurred, the questions arising upon the contention of the debtor, the beneficial devisee for life, are thus stated: "1. Whether the testator, by devising the legal estate to a trustee, with directions to pay over the rents and profits to the son for life, could lawfully impose a restriction upon the ordinary right of alienation of such equitable life estate, or protect such estate from all liability for the debts of the son, without any cesser of the estate devised; and 2. Whether, if the testator had such right, he has effectually exercised the same, by the terms employed in the will." In disposing of the question first stated, it is maintained that restraint upon alienation, either voluntary or by process of law, of an estate in fee or fee-tail will not be tolerated by the law, and that this principle is applicable to estates for life. The English courts, it is maintained, "treat the right of alienation and liability for debts as inseparable incidents of the life estate, whether limited by way of trust or otherwise, except where there is a reverter or a cesser of the estate, dependent upon an attempted alienation, or seizure by

creditors"; citing *Brandon v. Robinson*, 18 Ves. 482; *Foley v. Burnell*, 1 Bro. C. C. 274; *Rochford v. Hackman*, 9 Hare, 475; *Graves v. Dolphin*, 1 Sim. 66. The well-recognized exception to the general rule, expressed in the usual clause against anticipation, in devises to and settlements upon married women, is also noticed, referring to *Buckton v. Hay*, L. R. 11 Ch. Div. 645, for the reasons upon which the exception is founded. It is then observed, that "the incorporation of this exception, and the reason for it, furnish strong proof, not only of the existence of the general rule, but of the very special circumstances and pressing reason under which an exception could be allowed to that general rule." The course of legislation in Maryland, it is claimed, "shows the same tendency to unfetter property, and to remove all restraints upon alienation, and to subject all interests in property to the debts and obligations of its owner." It is further claimed that "no system of law can be founded in wisdom or sound public policy that allows restraints upon alienation, or which allows property to be withdrawn from commerce, and rendered free from the honest obligation of its owner. . . . Moreover, it is an encouragement of idleness, and of a lack of enterprise, and worst of all, it fosters a class who become habitually reckless, and indifferent to their honest obligations, from a sense that they are intrenched beyond the reach of the law." What was said in *Nichols v. Eaton*, 91 U. S. 716, in regard to the trusts under consideration, is claimed to have been "entirely obiter, and was in no manner required for the decision of the case as actually presented for decision." And in referring to the case of *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, the following language is used: "If the learned court intended, by what was said by it, to lay it down as a general principle, that in any and all cases where the legal estate may be vested in a trustee, the power of alienation exists, irrespective of the special nature of the trust declared, and though alienation might be a breach of that trust, and that therefore the rule against restraints on alienation would not be violated, such proposition, I submit, would not stand the test of reason." As regards the second question stated above, it is observed, in answer, that "the trustee is given no discretion, and the devise is to the son absolutely for life. According to all authority, the exclusion of the right of alienation and the liability for debts can only be effected, if at all, by the use of very clear and explicit terms. . . . The principle is settled that such restriction will not be implied from any ambiguous expressions, but must be declared in express terms, or be deducible from words that admit of no doubt whatever. The words here are not free of ambiguity." Both questions being answered negatively in the dissenting opinion, it followed therefrom, "that the fund was attachable for the debts of the *cestui que trust*."

VALIDITY OF TRUST PROVIDING THAT PROPERTY SHALL GO TO BENEFICIARY TO THE EXCLUSION OF HIS ALIENEEES AND HIS CREDITORS. — As a general rule, the law does not allow property, whether legal or equitable, to be fettered by restraints upon alienation, and generally, whenever property is subject to alienation by the owner it is subject to his debts: *Warner v. Rice*, 66 Md. 436; *Barnes v. Dow*, 59 Vt. 530; *Arzbacher v. Mayer*, 53 Wis. 380. At law, the owner of any property, real or personal, may alienate it, or it may, unless specially exempted by statute, be taken for the payment of his debts; and no form of grant or devise can enable the grantee or devisee to hold the estate without its being subject to alienation, attachment, and execution: *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241, and note 242, 243, where the earlier decisions are collected and the subject discussed; *Sparhawk v. Cloon*, 125 Mass. 263. So it is the settled doctrine in England,

that where the income of a trust estate is given to any person, other than a married woman, for life, the equitable estate for life is alienable by and liable in equity to the debts of the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts: *Brandon v. Robinson*, 18 Ves. 429; *Hood v. Oglander*, 34 Beav. 513; *Teague's Case*, L. R. 10 Eq. 564; *Sparhawk v. Cloon*, 125 Mass. 263, 266; *Pickens v. Dorris*, 20 Mo. App. 3. In this country, the English doctrine has been approved and adopted by the courts in many of the states: See *Smith v. Moore*, 37 Ala. 327; *Mandelbaum v. McDonnell*, 29 Mich. 78; 18 Am. Rep. 61; *Gray v. Obear*, 54 Ga. 231; *Hutchins v. Heywood*, 50 N. H. 491; *Hobbs v. Smith*, 15 Ohio St. 419; *Pace v. Pace*, 73 N. C. 119; *Easterly v. Keney*, 36 Conn. 18; *Tillinghast v. Bradford*, 5 R. I. 205; *Nichols v. Levy*, 5 Wall. 433. And it is said to be violative of public policy, and in fraud of the rights of creditors, to create a well-defined beneficial interest, legal or equitable, in property real or personal, or in its rents, income, or profits, which can be enjoyed by an insolvent debtor, free from liability for the payment of debts: *Taylor v. Harwell*, 65 Ala. 1, 13. Yet even in England, and in those states where the English rule is adopted, if the gift or devise contain a condition of cesser upon the bankruptcy or insolvency of the donee or devisee, or upon an attempted alienation, the restraint is valid: *Brandon v. Robinson*, 18 Ves. 433; *Teague's Case*, L. R. 10 Eq. 564; *Macleary's Case*, L. R. 20 Eq. 186; *Oldham v. Oldham*, L. R. 3 Eq. 404; *McKinster v. Smith*, 27 Conn. 628; *Bridge v. Ward*, 35 Wis. 687; *Stewart v. Brady*, 3 Bush, 623; *Tillinghast v. Bradford*, 5 R. I. 205, 212. There is nothing in the law to prevent one man from limiting an estate to another until he alienates it, or attempts to alienate it, or until he becomes bankrupt or insolvent, and as soon as he alienates, or attempts to alienate, or becomes a bankrupt or insolvent, that his estate shall cease, and go to another: *Camp v. Cleary*, 76 Va. 140. So the authorities are agreed that if the estate created is a mere use at the absolute and uncontrolled discretion of the trustee, the restraint is valid, and will be upheld, and the interest of the *cestui que trust* in the estate or income cannot be subjected to the satisfaction of his debts: *Troopenny v. Peyton*, 10 Sim. 487; *Keyser v. Mitchell*, 67 Pa. St. 473; *Hall v. Williams*, 120 Mass. 344; *Davidson v. Kemper*, 79 Ky. 5; *Leavitt v. Beirne*, 21 Conn. 9; *Heath v. Bishop*, 4 Rich. Eq. 46; 55 Am. Dec. 654.

The courts in some of the states have maintained the doctrine of the principal case without qualification, that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be alienable by them or be subject to be taken by their creditors, and that the founder's intention in this regard, when clearly expressed by him, must be carried out by the court: See *Sparhawk v. Cloon*, 125 Mass. 266, and cases cited; *Camp v. Cleary*, 76 Va. 140, 144. Thus in Pennsylvania, it is held that a benefactor has the power, by means of a trust, to restrict his bounty so that it shall not be liable to the debts, control, or engagements of the beneficiary: *Rife v. Geyer*, 59 Pa. St. 393, 396; 98 Am. Dec. 351; and in a later case it is said that an unbroken line of decisions has settled the law in that state that a father may, by creating a trust in proper form, provide for a son without exposing his bounty to the debts or improvidence of the beneficiary: *Thackara v. Mintzer*, 100 Pa. St. 151. So in Massachusetts, it is held that the founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate, and which his creditors cannot reach: *Broadway Nat. Bank v. Adams*, 133 Mass. 170; 43 Am. Rep. 504. But in order to give such a qualified estate, instead of

an absolute one, the language of the founder must be clear and unequivocal to that effect: *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320. In Vermont, a testator bequeathed money to his son "for the support of himself and family, and for no other purpose," and the testator's executors paid this legacy to the son's attorney. It was held that the money constituted a trust fund for the purposes named in the will, and that it could not be attached for the son's debts while in the attorney's hands: *White v. White*, 30 Vt. 338. It is likewise held by the Vermont court that a beneficiary under a will who is entitled to a life support out of an estate held by a trustee has no power to mortgage the estate, and a mortgage executed by such beneficiary and the remainderman is valid only as against the latter, except so far as it secured money used in paying debts resting on the estate: *Barnes v. Dow*, 59 Id. 530. In a line with these latter cases is a decision of the supreme court of the United States holding that the power of alienation is not a necessary incident to a life estate: *Nichols v. Eaton*, 91 U. S. 716. And this doctrine is reaffirmed in *Hyde v. Woods*, 94 Id. 523, 526. So a clause in a will providing that one half the devised property should vest in a trustee who was to pay the net rents and profits to the devisees in person, and that the devisees should have no power to encumber the estate or to anticipate the rents thereof, and that the property should descend to the heirs of such devisees, was held to be valid in *Spindle v. Shreve*, 9 Biss. 199; citing *Nichols v. Eaton*, *supra*, as authority for the doctrine "that the owner of property has the right to provide that his estate may be held in such a way that his children may receive the rents and profits of it during their lives, so as not to go to the benefit of creditors if his children are improvident or unfortunate": Drummond, J., in *Spindle v. Shreve*, 9 Id. 201. So in Missouri, a testator devised lands to a trustee for the use of his three sons, with power to use and enjoy equally the rents, issues, and profits of the lands during their natural lives, his object being to secure to his children "a certain annual income beyond the accident of fortune and bad management on their part, and with this end in view, to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their debts," and it was held that such restriction in the will was a valid one: *Lampert v. Haydel*, 96 Mo. 439; *ante*, p. 358; affirming 20 Mo. App. 616.

The authorities bearing upon both sides of the question are carefully and exhaustively reviewed in the opinion by Sherwood, J., in the higher court. And he observes that "the weight of authority would seem to favor the conclusion that such restraints upon alienation are not invalid, except when annexed to a legal title in fee; and there is certainly great force in the position that if a legal estate for life can be fettered by a restraint upon alienation, that a more rigid rule should not prevail in regard to equitable life estates. But it may be conceded that restraints upon the alienation of legal life estates are invalid at law, and still it does not follow that such restraints are invalid in respect to estates in equity of a similar duration," — setting out at length his reasons for this view of the subject: *Lampert v. Haydel*, 96 Mo. 439, 445; *ante*, p. 358.

A testator devised all his lands to trustees in trust for his daughter, the trustees to keep such lands well rented, to make reasonable repairs, to pay promptly all taxes and assessments thereon, to keep the buildings reasonably insured against fire, and to pay over all remaining rents and income in cash into the hands of his said daughter in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said daughter, the

trust to cease at her death, and the estate to vest in her heirs, etc. It was held that the intention of the testator was to place the net income of the property beyond the control of his daughter and her creditors while in the hands of the trustees, and that effect should be given to such intention by the courts. Although it be true that an absolute gift of property cannot be rendered inoperative by conditions annexed, it does not follow that a parent may not, by will or otherwise, make such reasonable disposition of his property, when not required to meet any duty or obligation of his own, as will effectually secure to his child a competent support for life; and the most appropriate if not the only way of accomplishing such an object is through the medium of a trust: *Steib v. Whitehead*, 111 Ill. 247, 251.

In some of the states, the validity of trusts created with a proviso against alienation, or that they shall not be liable to the debts of the *cestui que trust*, is sanctioned by express statutes: See *Arzbacher v. Mayer*, 53 Wis. 380; *Williams v. Thorn*, 70 N. Y. 270; *Cassagne v. Marvin*, 16 N. Y. St. Rep. 327; *Tolles v. Wood*, 16 Abb. N. C. 1, 20; 99 N. Y. 616; *Hann v. Van Voorhies*, 5 Hun, 427; 15 Abb. Pr., N. S., 79; *Hardenburgh v. Blair*, 30 N. J. Eq. 42. And it is said that the courts of the country are uniformly inclined to give full effect to such legislation: *Steib v. Whitehead*, 111 Ill. 247, 252. Thus in Tennessee, an active trust created by will duly recorded, for the support of the testator's widow and son, both *sui juris*, is valid and legal by legislative sanction, although its chief purpose be to protect the property against the debts and contracts of the son: *Jourolmon v. Massengill*, 86 Tenn. 81. And the court held that there was nothing inherent in the law or tenure of property, nor any sound principle of public policy, which interferes with the power of a testator to so guard his gift that it shall not be subject to the creditors of his donee, though such a trust be not sanctioned by statute: *Jourolmon v. Massengill*, *supra*; overruling *Turley v. Massengill*, 75 Id. 353; *Hooberry v. Massengill*, 78 Id. 392; and see, in support of the view there taken, *Campbell v. Foster*, 35 N. Y. 361; *Nickell v. Handley*, 10 Gratt. 336; *Pope v. Elliott*, 8 B. Mon. 56. But although in some of the states equity will uphold such a trust, yet it is clear that equity will support it only so long as it rests on the well-defined intention of the donor: *Overman's Appeal*, 88 Pa. St. 276. And a deviser's intention to withdraw his gift from the devisee's creditors will not be presumed from surrounding circumstances of which the creditor has no record notice, where such intention is not expressed in or necessarily implied from the terms of the instrument creating the trust: *Pickens v. Dorris*, 20 Mo. App. 1; *Sparhawk v. Cloon*, 125 Mass. 263.

SCARBOROUGH v. SCOTTEN.

[69 MARYLAND, 187.]

EQUITY WILL COMPEL THE SURRENDER OF PROMISSORY NOTES TO THEIR OWNER; the remedy for their recovery by an action at law cannot properly be regarded as adequate.

L. M. Haines and R. C. Thackery, for the appellant.

W. J. Warburton and Albert Constable, for the appellees.

IRVING, J. This appeal is from a decree of the circuit court for Cecil County, sustaining a demurrer to the appellant's bill in equity, and dismissing the same.

The appellant's bill charges that in the year 1880, being the owner of certain promissory notes and single bills, and desiring to have the same collected, he indorsed and delivered the same to William Scotten, the defendants' testator, with the understanding and agreement that he (William Scotten) would collect the same from the persons owing the promissory notes and single bills, and would pay over the amount so collected to Francina Scarborough, the wife of the appellant; that this agreement was made with the defendants' testator verbally at the time the promissory notes and bills were indorsed to him. The bill then avers that after such indorsement and delivery, William Scotten died without having collected any of the notes and bills so indorsed to him, leaving a will by which the defendants were appointed executors, and who have duly qualified as such; that they have, as executors, those promissory notes and single bills now in their possession; that Francina Scarborough, appellant's wife, to whom the proceeds were to be paid when collected, has assigned to the complainant all her interest in the same and their proceeds; that the defendants have not collected the same, nor made any effort to collect the same, and that their inaction is for the purpose of delaying and hindering the complainant in the collection of and receipt of the money due him thereon; that the complainant has demanded of the executors the delivery of the notes and single bills to him, but the defendants have refused and still refuse to surrender the same. The bill then charges that the complainant is without adequate remedy at law, and prays for a decree requiring the surrender of the promissory notes and single bills, copies of which are filed with the bill, and for such other relief as his case may require. By the demurrer, of course, all the facts

alleged are admitted, and the only question for us to decide is, whether the bill makes a case for equitable interference.

In sustaining the demurrer and dismissing the bill, the learned judge of the circuit court simply says: "I am of opinion that the bill presents a case where the plaintiff has a certain, adequate, and complete remedy at law: *Buzard v. Houston*, 119 U. S. 347; *Winner v. Penniman*, 35 Md. 163." In this view we do not concur.

Judge Story, in his *Equity Jurisprudence* (vol. 2, 7th ed., sec. 703), says that a court of equity will render remedial justice by decreeing the delivery up of deeds and other instruments of writing to those who are entitled to them. That learned author says it is a very ancient "head of equity jurisdiction." In the same section last cited, he says: "The same doctrine applies to other instruments and securities, such as bonds, negotiable instruments, and other evidences of property, which are improperly withheld from persons who have an equitable or legal interest in them, or who have a right to have them preserved. . . . It is true that an action of detinue, or even of replevin, might, in some few cases, lie, and give the proper remedy if the thing could be found. But generally in actions at law, damages only are recoverable, and such a remedy, in most cases, be wholly inadequate." Lord Hardwicke, in *Jackson v. Butler*, 2 Atk. 306, decreed the surrender of a mortgage by a pawnee of it, who had received it from a person who had received it from the owner for the purpose of collecting the interest due on it, and had violated his duty and pawned it. In many other cases, the principle has been applied: *Duke of Somerset v. Cookson*, 1 Hare and Wallace's Lead. Cas. Eq. 771-775; *Fells v. Read*, 3 Ves. 70; *Nutbrown v. Thornton*, 10 Id. 163.

There can be no doubt that the true ground of interference by a court of equity is the inadequacy of any legal remedy to give full relief. That is the test. In this case, the court below thought the remedy at law was full and adequate; and the court relies on *Winner v. Penniman*, 35 Md. 163, and *Buzard v. Houston*, 119 U. S. 347. In the first-mentioned case, this court decided that trover would lie in favor of one joint owner of a note against another joint owner, who surrendered it to the maker for cancellation. The plaintiff saw fit to rely on the action of trover against his co-owner, and was awarded damages, which were easily and fully measurable. In *Houston's* case, the supreme court merely decided

that if the paper sought to be restored were restored, the damages recoverable for its breach would be the same as in an action for deceit, because of the fraudulent procurement of its surrender. Full relief in those cases could be secured at law. In this case, however, it would not seem that trover or replevin will secure full and adequate relief. Replevin would secure the surrender of the notes if the defendants saw fit to exhibit them to the officer, and allowed him to take them; but the officer could not search their persons or the places where the defendants kept their money and securities. From the very nature of the things sought to be recovered, they could not be obtained by the officer against the will of the defendants; and having refused to deliver them upon demand, as the demurrer admits the defendants have done, and for the reason assigned, it is plain the action of replevin would be nugatory for the recovery of the specific things sought, and if, after return of eloigned, the suit should proceed as an action for damages, the measure for damages would be the same as in trover,—the value of the property taken and detained. In trover, the measure of damages is the actual value of the property taken at the time of conversion: *Hepburn v. Sewell*, 5 Har. & J. 212; *Herzberg v. Adams*, 39 Md. 309.

In the present case, the ascertainment of the value of the notes would involve inquiry into the solvency of fifteen persons, for if the parties were insolvent, the notes could not be worth what they promised to pay. The action of trover could, it may be conceded, be brought, but such action could not certainly give him adequate relief. In that action the measure of damages would be the actual value of the notes at the time of the taking of them by the defendants: *Hepburn v. Sewell*, 5 Har. & J. 212, and *Herzberg v. Adams*, 39 Md. 309. As we have said, the solvency of fifteen persons would be the subject of inquiry, for the defendants in that action could not be bound to pay for these notes more than they were worth; and when the judgment was obtained and paid, by the decision of this court in *Hepburn v. Sewell*, *supra*, the defendants would become the purchasers of the notes, and the plaintiff's right to them would cease. It might very well be that some or even all of the makers of the notes were insolvent when the conversion of the notes by the defendants took place; but it is not a fair or reasonable presumption that they would always remain so; and the plaintiff in this case ought not to be forced to part with the notes for what they

were actually worth when taken from him, when the possibility of larger recovery in future existed. He ought to have his notes, and be allowed to bide his time for the collection thereof, as he might find practicable, if the makers should eventually become more prosperous, and pecuniarily more responsible. It is at least but equitable to allow him his own judgment and discretion whether to sue them now, and hold his judgment until there be an opportunity to make it, or defer as he pleases; and it is inequitable to force him in effect to sell them for what an action of trover would give him for them. Besides, in an action at law against the defendants, the questions arising upon the solvency of so many persons would involve tedious and protracted litigation, and questions of evidence to which he ought not to be subjected. Such questions could not arise between this appellant and his debtors in a suit between them. A suit at law to give full measure of relief should not involve such delay and expense, nor the uncertainty of a jury's decision on the proof. A legal remedy imposing such a hardship cannot be full, complete, and ample. We think the bill, if its allegations be true, does disclose a case for equitable interference. There was error, therefore, in sustaining the demurrer and dismissing appellant's bill. The defendants ought to have been required to answer, and if the allegations of the bill are sustained by proof, the appellant should be accorded the relief he asks for. The decree must therefore be reversed, and the cause remanded, to the end that the demurrer may be overruled, and the case proceed regularly to decree as the proof may justify.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTES. — A VENDOR HAS THE RIGHT OF STOPPAGE *in transitu*, not only against vendee, but also against a creditor of his vendee, who has made a loan upon the promise of such vendee to transfer the paper to him upon its arrival: *Mueller v. Ponder*, 55 N. Y. 325; 14 Am. Rep. 259.

NEGOTIABLE INSTRUMENTS. — Pledgee of note may maintain action against the pledgor for conversion of a note, where latter has obtained it, though without fraud, under an agreement that he is to return it or another note, which agreement he refuses to comply with: *Way v. Davidson*, 12 Gray, 465; 74 Am. Dec. 604.

HUNCKEL v. VONEIFF.

[69 MARYLAND, 179.]

LIBEL OR SLANDER BY A WITNESS. — AN ACTION WILL NOT LIE AGAINST A WITNESS for slanderous words uttered by him in giving his testimony, though false, prompted by malice, and not necessary to answer the question asked him. Hence it was held that no recovery could be had against a witness who, on being asked how many days intervened between two events, instead of answering that he did not remember, said: "Not knowing that a mistress or woman of Mr. Plitt's would step in and claim the lawful wife's property, I did not keep an account of the date that way; if I would have, I would have noticed the date and all those little particular incidences, to save Mrs. Plitt from much heart-ache and trouble, and cause of her death."

ACTION by Katherine Hunckel and her husband to recover damages for slanderous utterances of the defendant, Mrs. Voneiff, while testifying as a witness in an equity suit. A demurrer to plaintiffs' complaint was sustained.

W. S. Bryan, Jr., for the appellants.

Edward Higgins, for the appellees.

MILLER, J. This is an action of libel or slander against a witness in an equity cause, whose testimony was written down by the examiner, returned to the court, and read at the hearing before the judge. The alleged libelous or slanderous statements are contained in the testimony thus taken. There was a demurrer to each of the two counts in the declaration, which the court sustained, and thereupon gave judgment for the defendants. From that judgment this appeal is taken.

In the able arguments of counsel, the whole field of the law on the question of privilege has been explored, and we believe all the decisions as well as the opinions and *dicta* of eminent judges have been cited and pressed upon our attention. It would be a tedious task to review them in detail, and a hopeless one to attempt to reconcile them. The question is a new one in this state. No precedent for such an action has been found in our reports or judicial records, and we believe this is the first attempt to bring one since a court of justice was first established in the colony of Maryland, — a period of more than two centuries. This fact, while it may not be conclusive against the right to maintain the action, certainly leaves us free to follow and adopt those authorities which state the law in accordance with what, in our judgment, the administration of justice and a sound public policy demand.

The case now before us is not that of an advocate, but of a witness, and in our opinion, it is of the greatest importance to the administration of justice that witnesses should go upon the stand with their minds absolutely free from apprehension that they may subject themselves to an action of slander for what they may say while giving their testimony. Mr. Townshend, in his book on slander and libel, well says: "The due administration of justice requires that a witness should speak according to his belief the truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness that, except for any willfully false statement, which is perjury, no matter that his testimony may, in fact, be untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him. It is not simply a matter between individuals: it concerns the administration of justice. The witness speaks in the hearing and under the control of the court, is compelled to speak with no right to decide what is immaterial, and he should not be subject to the possibility of an action for his words": Townshend on Slander and Libel, sec. 223.

But there is more substantial authority for the absolute character of the privilege. In the standard work of Starkie on Slander, it is laid down as the result of the English decisions that "witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony": 1 Starkie on Slander, 242. This statement of the law has been frequently quoted with approval by the English courts, and in some instances by courts and text-writers in this country: *Terry v. Fellows*, 21 La. Ann. 275. In support of the absolute character of the privilege, a long list of English decisions, ancient and modern, has been cited. Without referring to the earlier ones, we mention some of those decided in more recent times, which have special reference to the case of parties and witnesses: *Revis v. Smith*, 86 Eng. Com. L. 126; *Henderson v. Broomhead*, 4 Hurl. & N. 568; *Kennedy v. Hilliard*, 10 L. R. C. L. 195; *Dawkins v. Rokeby*, 4

Fost. & F. 806; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255; and same case on appeal in the house of lords, L. R. 7 H. L. 744.

In these cases, Willes, Coleridge, C. J., Cockburn, C. J., Blackburn, Kelly, C. B., Creswell, Lord Cairns, and other eminent jurists, have again and again expressed the opinion that the privilege of a witness should be absolute, have pointed out the great benefit of such privilege to the administration of justice, and have deprecated in strong terms the evil consequences they thought would ensue if witnesses were placed under any intimidation, or the fear of being involved in litigation by reason of what they might say when under examination. In *Dawkins v. Rokeby*, *supra*, the judges were called in, and gave unanimously an answer to the question put to them by the house of lords, in which they say: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If that were all, evidence of express malice would remove this ground. But the principle, we apprehend, is, that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary courts of justice, are numerous and uniform."

After this decision the case of *Seaman v. Netherclift*, *supra*, arose, which was tried before Coleridge, C. J., at *nisi prius*, and afterwards decided by him and Brett, J., in L. R. 1 Com. P. 540, and subsequently by the court of appeal in L. R. 2 Com. P. 53. The judges who heard the case on appeal were Cockburn, C. J., Bramwell, J. A., and Amphlett, J. A., and they disposed of it at once. Cockburn, C. J., said: "If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be and are constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins v. Lord*

Rockeby, after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry [the inquiry referred to being a military court of inquiry instituted to investigate the conduct of an officer] is privileged notwithstanding it may be malicious; and to ask us to decide otherwise is to ask what is beyond our power. But I agree that if, in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness, or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say *dehors* the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case (*Trotman v. Dunn*, 4 Camp. 211) before Lord Ellenborough. Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry, in order to assail the character of another, as if he were asked, Were you at York on a certain day? and he were to answer, Yes, and A B picked my pocket there; it certainly might well be said in such a case that the statement was altogether *dehors* the character of witness, and not within the privilege." So, in speaking upon the same subject, Bramwell, J. A., says: "Suppose while the witness is in the box, a man were to come in at the door, and the witness were to exclaim, 'That man picked my pocket.' I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he may say in the witness-box wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything a witness said should be protected than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that, I think the words 'having reference to the inquiry' ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the judge would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evi-

dence with reference to the inquiry as to which he had been called as a witness."

Amphlett, J. A., on the same subject, says: "How it would have been if this statement had been volunteered by the defendant, without it being necessary, or in any way arising from questions he had been asked, we need not express any opinion. In such a case, it may be that the words would not have been spoken in his office of a witness. I must by no means be taken as expressing an opinion that, in such a case, the witness would not be protected. I can see many reasons why a witness should be absolutely protected for anything he said in the witness-box. If he did voluntarily make a scandalous attack while giving evidence, he would be guilty of a gross contempt of court, and might be committed to prison by the presiding judge; or if he were before an inferior tribunal, and he persevered in his scandalous statements, he might be liable to an indictment for obstructing the course of justice." Much, also, was said as to the privilege of a witness in the still more recent case of *Munster v. Lamb*, L. R. 11 Q. B. Div. 588, in the court of appeal, and we feel ourselves at liberty to adopt, if we choose, what was said in that case on that subject. The judges (Brett and Fry) there again affirmed the absolute character of this privilege in the broadest terms. "Why should," says Fry, L. J., a witness be able to avail himself of his position in the box, and to make, without fear of civil consequences, a false statement, which, in many cases, is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because, if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting *bona fide*, who, under a different rule, would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions." And he refers to the fact that courts

of justice have control over all proceedings before them, and have ample powers to check improper conduct on the part of witnesses as well as of solicitors and counsel.

Such are the English decisions. As to authority on the same subject in this country, we have already referred to what has been said by Mr. Townshend in his book on slander and libel; and we have the authority of Judge Cooley to the effect that "among the cases which are so absolutely privileged on reasons of public policy that no inquiry into motives is permitted in an action for slander or libel, is that of a witness giving evidence in the course of judicial proceedings. It is familiar law, that no action will lie against him at the suit of a party aggrieved by his false testimony, even though malice be charged"; and for this a number of authorities from different states are cited: Cooley on Constitutional Limitations, 545. Again, Mr. Wait seems to adopt the English cases as laying down the true rule: 7 Wait's Actions and Defenses, 438. A different view as to the extent of the privilege has been taken by the courts of many of the states; and it may be conceded that the weight of authority in this country is in favor of a much greater restriction upon the privilege than is sanctioned by the English decisions. But we are not controlled by any decision of our own courts, and are at liberty to settle the law for this state according to our best judgment. After a most careful consideration of the subject, we are convinced that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited, and we accordingly adopt the law on this subject as they have laid it down.

It remains to apply this law to the case before us. The declaration does not state definitely what the controversy or matter of inquiry in the equity case of *Manning v. Voneiff* actually was. Enough is stated, however, to warrant the inference that the female plaintiff was a party to that suit, or was preferring a claim in some capacity to the estate, or some part of it, of a Mr. Plitt, deceased, and that the witness, or her husband, was resisting that claim. The defendant was examined as a witness in that case, and so far as her testimony is set out in the declaration, it appears she was first asked if she remembered quite distinctly the day on which her husband told her he was copying certain deeds at Mr. Plitt's request. To this she replied that she saw her husband copying some papers; that he had a file of papers copying them,

and she, being inquisitive, asked him what he was writing, and he said he was copying some deeds Mr. Plitt asked him to copy. She was then asked, "Was that the same day on which the magistrate came to see Mr. Plitt?" To this she replied, "No; I don't think so." She was then asked, "Well, how many days, about, intervened?" To this she replied, "Not knowing that a mistress or woman of Mr. Plitt's would step in to claim the lawful wife's property, I did not keep an account of the date that way; if I would have, I would have noticed the date and all those little particular incidences, to save Mrs. Plitt from much heartache and trouble, and cause of her death." This is the libel or slander complained of. Now, it is true she could have answered the question by simply saying she "did not remember." It is also true that the imputation thus cast upon the plaintiff was grossly slanderous. She may have made it from malice, knowing at the same time that it was false, and from the averments of the declaration which the demurrer admits, we must so take it. Still, it was the excuse she chose to give as to not remembering the date about which she had been pressed by this and two previous questions. It is, as we consider it, nothing more than a reflection cast upon a party to the controversy in answer to a question which could have been answered without making such reflection. The answer might have been expunged from the record, or the witness punished for making it; but it is quite impossible to say that she did not make it in her character as witness, or that it is at all like the examples put by the judges in *Seaman v. Netherclift supra*, as being entirely outside of the privilege.

Judgment affirmed.

THE SAME COURT, at the same term, considered the cognate subjects of the liability of counsel and of parties in judicial proceedings to actions seeking to recover damages for libelous or slanderous utterances therein. In *Maulsby v. Reifsnnyder*, 69 Md. 143, the defendant was sued for words spoken by him, as counsel, during the trial of a cause. To defendant's plea that the words were so spoken, the plaintiff replied, in his replication, that the words "had no reference to said action, or to any subject-matter involved in said action, or to any judicial inquiry which was going on or being had in said action." A demurrer to this replication was sustained in the trial court. The court of appeals adjudged this action to be erroneous, and refused to follow the late English decisions holding the privilege of counsel to be absolute. Instead of the doctrine of those decisions, the court preferred that of the earlier English and American cases, under which "the privilege of counsel is limited to words spoken which are pertinent, or which have relation to the matter of inquiry." The action of the trial court was, how-

ever, held to be a harmless error, because it sufficiently appeared from the declaration that the "alleged defamatory words spoken by the defendant had reference to the subject-matter involved in the cause then on trial." In *Bartlett v. Christy*, 69 Md. 219, the plaintiff and defendant had been co-receivers, and the latter, in a petition against the former in a judicial proceeding, had charged him with unlawfully withholding assets, obstructing their collection, acting in contempt of the authority of the court, and embezzling moneys belonging to the trust. It was alleged that the charges in such petition were falsely and maliciously made. A demurrer interposed to the plaintiff's declaration was sustained. In affirming the judgment of the trial court, the court of appeals said:—

"It is insisted that the appellee is not liable to be sued in an action for libel on account of anything stated by him in the petition alluded to; because it is claimed that the statements alleged to be libelous are privileged. We have had before us this term cases involving the privilege of counsel and of witnesses, and in the opinions delivered in those cases the authorities upon the subject of privilege have been fully reviewed. The case now before us, as far as the first count of the declaration is concerned, is of a kindred character, and must, therefore, be governed by the view of the law adopted by a majority of this court in those cases. It is stated in a work of high authority that 'an action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a court of competent jurisdiction, — such as defamatory bills or proceedings filed in chancery, or in the ecclesiastical courts, or affidavits containing false and scandalous assertions against others. Therefore, if a man goes before a justice of the peace and exhibits articles against the plaintiff containing divers false and scandalous charges concerning him, the plaintiff cannot have an action for a libel in respect of any matter contained in such articles, for the party preferring them "has pursued the ordinary course of justice in such a case; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain for fear of infinite vexation." There is a large collection of cases where parties have, from time to time, attempted to get damages for slanderous and malicious charges contained in affidavits made in the course of a judicial proceeding, but in no one instance has the action been held to be maintainable; but the libeler may be punished, and the abuse repressed by prosecution for perjury, the result of which is to make the libeler infamous if he is convicted': 2 Addison on Torts, Wood's ed., sec. 1092. In *Odgers on Libel and Slander*, side page 193, it is stated that every affidavit sworn in the course of a judicial proceeding before a court of competent jurisdiction is absolutely privileged, and no action lies therefor, however false and malicious may be the statement therein. The only exception is where an affidavit is sworn recklessly and maliciously before a court that has no jurisdiction in the matter, and no power to entertain the proceedings. The court will order scandalous matter to be expunged; but even for such matter no action will lie.

"*Kidder v. Parkhurst*, 3 Allen, 396, was an action for a libel on the plaintiff in a complaint made by the defendant against her for perjury. The complaint was made to the grand jury. The court says: 'It [the complaint] therefore appears to have been made in the regular course of justice, and the decisions, ancient and modern, are uniform that no proceeding in a regular course of justice is to be deemed an actionable libel.'

"In *Seaman v. Netherclift*, L. R. 1 C. P. D. 540, Lord Coleridge, C. J., said: 'Now, a long course of authorities, of which perhaps the best known,

as the most remarkable, is the case of *Astley v. Younge*, has decided that no action of slander can be brought for any statement made by the parties either in the pleadings or during the conduct of the case. The law is so stated very clearly by Lord Eldon in *Johnson v. Evans*, 3 Esp. 32; it is so stated also, not indeed with absolute certainty, in a note to the well-known case of *Hodgson v. Scarlett*, the author of which note, we learn from Baron Alderson, in *Gibbs v. Pitts*, 9 Mees. & W. 358, to have been Mr. Justice Holroyd himself. But I conceive the law on this point to be now quite certain, although most men of any experience in the profession must have seen many instances in which judicial proceedings have been made by parties to them to serve the ends of private malignity.'

"In *Henderson v. Broomhead*, 4 Hurl. & N. 577, Crompton, J., laid it down that 'no action will lie [for words spoken or written in the course of any judicial proceeding]; and again: 'The rule is inflexible, that no action will lie for words spoken or written in the course of giving evidence.'

"Where the cause of action against a defendant was, that he falsely and maliciously and without any reasonable cause went before a commissioner for taking oaths in the court of chancery, and swore an affidavit stating of the plaintiff, in his character of an auctioneer, that he conducted his business fraudulently and improperly, and that he was not, in the deponent's opinion, a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the court of chancery, and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale, it was held that the affidavit, being made in the course of a judicial proceeding, could form no ground of action: *Revis v. Smith*, 18 Com. B. 126; 25 L. J. Com. P. 195; see also *Astley v. Younge*, 2 Burr. 807; *Townshend on Slander and Libel*, sec. 221. These authorities, and others which might be cited, hold that statements made in any of the pleadings or proceedings in a cause before a court having jurisdiction of the subject are absolutely privileged, even though made maliciously and falsely. This privilege, protecting against a suit for libel or slander, is founded upon what would seem to be a sound public policy which looks to the free and unfettered administration of justice, though as an incidental result it may, in some instances, afford an immunity to the evil disposed and malignant slanderer.

"Whilst the appellee was not, in the literal sense of the term, a party to the case of *Muir v. Whiting & Co.*, he is none the less within the reason, the spirit, and the policy of the rule laid down and enforced by the decisions referred to. In this case, it is not material whether the privilege invoked be considered an absolute or a qualified one, because the ruling of the court below upon the first count of the *narr.* is correct in either event. If the privilege be an absolute one, no action can be maintained at all for the alleged libelous words; and if, on the other hand, it be only a qualified privilege, — that is, a privilege protecting the party using the words, provided the thing written has relation to the subject-matter undergoing judicial investigation, — the action cannot be sustained in this case, for the reason that every averment of the petition did have a most direct relation to the subject-matter brought before the court under that petition. The concession made by the demurrer that these statements were false and maliciously made does not render them actionable if the privilege be absolute, or if they be within the scope of a qualified privilege such as has been described.

"Now, both the appellant and the appellee were receivers in the case of *Muir v. Whiting & Co.* It was their duty to collect the assets of the firm, and to preserve them for the benefit of the trust. If either of them became

derelict in his duty, it was plainly incumbent upon the other to bring that fact to the knowledge of the court whose officers they both were. The proper and the only mode to do this was by petition filed in the case, and addressed to the court. This the appellee did. His act was, therefore, in the due, ordinary, and regular course of justice. It was strictly within the line of a proper proceeding before a tribunal having jurisdiction of the subject, and having control of its own offices. Even though the words used in the petition are libelous, we think, with Mr. Addison, that under such circumstances no case can be found where a recovery has been allowed in a suit for libel founded upon statements contained in such a proceeding, and the reason is obvious. To allow such suits to prevail would most effectually deter every one from presenting a well-founded complaint for fear of being pursued with 'infinite vexation.' It is better, therefore, where the statements are false, and knowingly false, to leave the party injured to the redress which the criminal court may apply, than to open the door for the institution of civil suits which may be successfully used as an efficient means to obstruct the full and fearless pursuit and administration of justice."

LIBEL OR SLANDER — PRIVILEGED COMMUNICATIONS. — Words spoken in a judicial proceeding, whether by parties, counsel, or witnesses, are privileged: *Stewart v. Hall*, 83 Ky. 375; note to *Shadden v. McElhree*, 6 Am. St. Rep. 825-828; note to *Byam v. Collins*, 7 Id. 741. Every person having reasonable and probable cause to believe that a crime has been committed has the right to communicate his suspicion to a magistrate having jurisdiction in the premises; but the existence of reasonable and probable cause for suspicion is essential to make the communication privileged: *Pierce v. Oard*, 23 Neb. 828.

DEVECMON v. SHAW.

[69 MARYLAND, 199.]

CONSIDERATION. — AGREEMENT TO PAY THE EXPENSES OF ANOTHER PERSON, IF HE WILL TAKE A TRIP TO EUROPE, in no way connected with the promisor's business, is upon sufficient consideration; and if the promisee takes such trip, he may recover the amount of his expenditures from the promisor.

UNDER A COMMON COUNT IN INDEBITATUS ASSUMPSIT THE PLAINTIFF MAY RECOVER MONEYS DUE HIM UNDER A SPECIAL CONTRACT. — It is unnecessary to declare on such contract specially.

AN ACCOUNT SETTLED MUST BE REGARDED AS CONCLUSIVE BETWEEN THE PARTIES in the absence of proof showing errors of some kind.

ACTION against the defendants as executors of John S. Combs, deceased. The plaintiff appealed.

J. Semmes Devecmon and Ferdinand Williams, for the appellant. .

A. Hunter Boyd, for the appellees.

BRYAN, J. John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared in

the common counts, and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony, which is thus stated in the bill of exceptions: "That the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all money expended by him in said trip; and that the trip was so taken and the money so expended by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct in being thus willing to pay his nephew's expenses as liberal and generous on his part." On objection, the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was, the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present, or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretense.

As the plaintiff, on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in *indebitatus assumpsit*, and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants'

testator in his lifetime, at his request." In the bill of particulars we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted: —

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in the bill of particulars, marked 'Exhibit No. 1, Bill of Particulars.' "

The only evidence bearing on this question is the account taken from the books of the deceased, which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

Judgment reversed, and new trial ordered.

CONTRACTS — CONSIDERATION. — DETRIMENT TO PROMISEE IS AS SUFFICIENT AS A CONSIDERATION as benefit to the promisor: *Bank etc. v. Bridgers*, 98 N. C. 67; 2 Am. St. Rep. 317, and note 321; *Alabama etc. v. South and North etc.*, 84 Ala. 570; 5 Am. St. Rep. 401.

ACCOUNTS STATED — CONCLUSIVENESS OF: *Borngesser v. Harrison*, 12 Wis. 544; 78 Am. Dec. 757; and note to *Lockwood v. Thorne*, 62 Id. 91. Where parties have settled and stated their accounts with one another, each is bound thereby, unless he can furnish clear proof of a mutual mistake or of fraud: *Neff v. Wooding*, 83 Va. 432. In an action for an account, if defendant pleads final settlement, it is the duty of the court to have this issue determined before ordering a reference for account: *Quarles v. Jenkins*, 98 N. C. 258.

ASSUMPSIT. — ONE MAY DECLARE IN ASSUMPSIT, AND SEEK TO RECOVER ON STRENGTH of a special contract, but he will be bound by it: *Baltimore etc. R. R. Co. v. Rathbone*, 1 W. Va. 87; 88 Am. Dec. 664. Where one has paid to another money on a contract, and subsequently there has been a rescission of the contract entitling the former to recover back part of the money so paid, he may do so upon account for money had and received: *Evans v. Givens*, 22 Fla. 476.

CENTRAL RAILWAY COMPANY v. PEACOCK.

[69 MARYLAND, 257.]

PASSENGER WHO LEAVES A STREET-CAR ON WHICH HE WAS RIDING without advising the person in charge that he left it temporarily and intending to return and claim his place, ceases to be a passenger, and loses his right to be protected as such.

IF STREET-CAR DRIVER LEAVES HIS CAR AND ASSAULTS ONE WHO HAD BEEN A PASSENGER thereon, but who had left the car and was then walking on the street, the company is not answerable for such assault, although it arose out of an altercation in the car, and the person assaulted had left the car for the purpose of walking to the company's office to report the driver for alleged misconduct. The act of the driver is not within the scope of his authority. The contract of carriage terminated when the passenger left the car.

ACTION to recover damages for a battery of the plaintiff by a servant of the defendant. The court, at the instance of the plaintiff, instructed the jury as follows: "1. If the jury find, from the evidence, that the plaintiff was a passenger upon the defendant's car, and had gotten thereon at the corner of Lancaster Street and Broadway, to ride to the corner of Preston and North streets, and had paid his fare, and that the conduct of the plaintiff, as such passenger, was becoming and proper, and that the driver and conductor of the said car used abusive and insulting language to the said plaintiff, and threatened even to strike him, and offered him other indignities while he was upon said car, and that the plaintiff, when the said car approached the office of the superintendent of said defendant, left said car to report the conduct of said driver and conductor to the proper officer of said defendant, intending to return to said car after making such report, and continue to ride thereon to his destination, and that the said driver and conductor followed the plaintiff and assaulted and beat him, then their verdict must be for the plaintiff. 2. If the jury find for the plaintiff under the first prayer of the plaintiff, they should award the plaintiff such sum as damages as will compensate him for the injury to him pecuniarily, to his person, his feelings, and character, arising from the unlawful act of the defendant." To both of these instructions the defendant excepted. The defendant asked for instructions to the effect that if the assault was committed on the sidewalk by the driver, who had left his car for that purpose, then the assault was not in the scope of his authority; and the defendant is not answerable therefor unless it was made by its direction.

The court refused to give the defendant's instructions. Verdict and judgment for plaintiff.

George Blakistone and T. W. Blakistone, for the appellant.

Joseph Pollard and H. W. Latane, for the appellee.

IRVING, J. This is a suit for personal injuries received by the appellee at the hands of the conductor and driver of the appellant's street-car, at a time when the appellee contends he was a passenger, and as such entitled to the protection of the appellant from the violence of its employee.

The questions in the case are, Was there such evidence in the case of the appellee being a passenger of appellant when the assault was committed, and of the conductor acting in the line of his duty and scope of his employment, as justified the court in refusing the prayer of the appellant, that there was no legally sufficient evidence in the cause to enable the jury to find for the plaintiff?

The evidence shows that the appellee entered the appellant's car at the corner of Broadway and Lancaster Street, intending to ride to the corner of Preston and North streets, near which the appellee lived; and to which point he was accustomed to ride on the defendant's cars, and had been almost daily in the habit of riding for several years in returning from his work. On this occasion, as the car turned into Preston Street, several ladies got into the car, and as it was full, the appellee arose and gave his seat to a lady, and stood in front of the seat which he had occupied. Whilst he was so standing, the driver, who was also conductor, and the only officer of the car, opened the door and said to appellee: "Captain, I want you to sit down." The appellee replied, "I have given my seat to this lady, and there is no other; when I can get a seat I will sit down." To this the driver replied with profane and abusive language, and told the plaintiff (the appellee) "that if he would get off the car he would fight him. To this the appellee simply replied, "When we get to the office of the company I will report you." The office of the company, according to the proof, was at the stables where the car stopped for a change of horses, which the appellee knew. It was "on the south side of Preston Street, west of Greenmount Avenue, six blocks west of Caroline Street, and about one block east of North Street." The entrance to the office was on Barclay Street. Just after the car crossed Greenmount Avenue, and at its west

side, it was stopped for some ladies to get off. The appellee also got off at that point, intending, as he said, to go to the office of the company (which was not yet reached), and report the driver while the horses were being changed, and then to resume his seat in the car. The car started on again, and the driver, seeing the appellee going towards the office, again stopped the car before it had quite reached the point for stopping to change the horses, and jumped from the car from the front platform with the iron brake belonging to the car in his hand, and went straight across the street and intercepted the plaintiff on the public sidewalk at the mouth of an alley which runs south from Preston Street, and exclaiming to the appellee, "God damn you, I'll give you something to report," struck him twice with the brake. The first blow felled him to his knees, when the conductor struck him again, and was prevented from giving a third blow by being seized by a police-officer. Both blows were on the appellee's head, and he was considerably hurt. Appellant admits that if the appellee was a passenger at the time, the company was bound to protect him from injury from its employees or the ill usage of strangers in the vehicle; but the appellant contends that not only had the appellee ceased to be a passenger, but that the driver by stopping the car and leaving the horses standing in the street, and proceeding to the sidewalk to assault the appellee, violated his duty and stepped aside from the line and scope of his employment, and that consequently the appellant was not answerable for his conduct.

Judge Cooley, in his work on torts, page 535, says: "The liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do." He illustrates his meaning by this statement: "So if the conductor of a train of cars leaves his train to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that in which the passenger is ejected from the cars is obvious. The one is a trespass he has stepped aside to commit, the other is committed in the course of his employment." The statement of the law by this eminent jurist seems to be supported by direct decision: *Crocker*

v. *New London etc. R. R. Co.*, 24 Conn. 249; *Pittsburgh etc. Pass. R. R. Co. v. Donohue*, 70 Pa. St. 119; *Evansville R. R. Co. v. Baum*, 26 Ind. 70; *Wright v. Wilcox*, 19 Wend. 843.

The supreme court of the United States, in *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 645, decide unequivocally that the carrier of passengers must protect his passengers from the violence of the carrier's employees, as also from that of other passengers; but there is nothing in the decision in conflict with the doctrine that to render liable the employee must be at the time acting in the employment of the railroad, and within the line of his duty, and the decision assumes that the party injured is a passenger when injured; for that was the fact in the case. That case only decides that the carrier is liable for the act of his servant engaged in the act of executing the contract for the transport of the passenger. To bring this case within the operation of the rule thus laid down, and no doubt rightly, it should appear from the proof that the appellee was a passenger at the time, and that the driver was executing the contract for transportation.

When the appellee entered this street-car, it does not appear he had a ticket to any particular point. Upon entering the car, according to the well-understood arrangement, the carrier was bound to take the passenger for the stipulated fare to any point within the termini of the road where he might desire to alight. Whenever the passenger did alight, that contract was at an end, unless his alighting was well understood by the carrier's agent to be rightful and temporary, and that he was to resume his seat. He says he alighted for a purpose, and intended to resume his place in the car, and continue his journey; but this purpose was not communicated to or assented to by the driver and conductor. After he had alighted and walked a square, could he resume his place in the car without paying another fare without the assent of the conductor? Would the conductor be justified in omitting to demand another fare? We think not. Had he remained in the car until the stables were reached and the horses were being changed, the carrier would have understood his journey was not completed; and whilst the horses were being changed, he would still have been regarded as a passenger, and would have been entitled to protection as against the employees if he then had gone into the office to execute his declared purpose to report, if *Keokuk N. Line Packet Co. v. True*, 88 Ill. 608, *Jef-*

ersonville etc. R. R. Co. v. Riley, 39 Ind. 568, and *State v. Grand Trunk R'y*, 58 Me. 176, correctly lay down the law. Those cases only establish that, while the car or boat may actually stop, the passenger need not confine himself to the boat, car, or vehicle in order to preserve his relation and rights as a passenger. But that is not the case here; the appellee voluntarily alights a square or block away from where the car will stop to change horses, and takes his place with other pedestrians on the sidewalk of the street. The carrier had a right to regard his contemplated trip as ended and contract executed. He was no longer being carried as a passenger, but was walking on the street. Being discovered in this act, the driver, whose conduct was most outrageous, and deserved the dismissal from service which followed, stopped his horses, left his car in the street, and pursuing him, inflicted the injury complained of. True, he had been insulted in the car; but he was not assaulted in the car. He was not forced to leave the car or ejected from it. He voluntarily left when a place was made for him to sit down by several ladies leaving the car. No matter what his intention was as to resuming his place and finishing his contemplated journey, it was not announced nor assented to. The contract was to carry him as long as he staid in the car to the end of the route,—not to let him ride and walk alternately as he chose. Whilst the contract of carriage continues, the passenger must, to some extent, be subject to the carrier's control. The liability for his safety, and even for his conduct to co-passengers, so requires. When he left the car, the carrier was certainly not liable for his conduct on the street, nor for the conduct of a stranger to him on the street. Why, then, should the appellant be answerable for the assault if its driver, who actually stopped his team, and left it in the street with his passengers unguarded, in order that he might pursue his victim and knock him down. In doing this, he cannot be regarded as acting within the sphere of his duty or scope of his authority. He left, and stepped aside from both in order to gratify his spleen; and upon the authorities already cited, we cannot doubt that it was error to hold the appellant responsible.

The first prayer of the appellant ought to have been granted, and the case taken from the jury. It follows, of course, that the plaintiff's prayers were erroneously granted.

Judgment reversed.

MASTER AND SERVANT. — LIMITATION OF MASTER'S LIABILITY FOR ACTS OF SERVANT: Note to *Muss v. Stern*, 3 Am. St. Rep. 87.

MASTER AND SERVANT — WHETHER ACT OF SERVANT WAS IN LINE OF HIS DUTY OR NOT: Note to *St. Louis etc. v. Hendricks*, 3 Am. St. Rep. 223.

MASTER AND SERVANT. — LIABILITY OF MASTER FOR THE TORTS OF HIS SERVANTS: Note to *Hussey v. Norfolk etc. R. R. Co.*, 2 Am. St. Rep. 317.

NEW YORK, PHILADELPHIA, AND NORFOLK RAILROAD COMPANY v. COULBOURN.

[69 MARYLAND, 360.]

RAILROADS. — BEFORE STARTING A TRAIN OR CAR WHICH ONE HAS ENTERED FOR A LAWFUL PURPOSE, as where an employee has entered a pay-car to obtain his wages, he must be afforded a reasonable time to transact his business, and given proper warning of the purpose of putting the train in motion, to enable him, by the use of reasonable diligence and care, to leave the car without risk of injury to himself in getting off.

JUMPING FROM A CAR MOVING AT THE RATE OF FIVE MILES AN HOUR does not necessarily constitute negligence. The jury, in determining whether a person who so jumped was guilty of contributory negligence, are entitled to take into consideration all the facts and circumstances of the case, and to determine from them whether he acted as a reasonably cautious man would under like circumstances.

ACTION to recover of defendant, the railroad company, compensation for injuries received by the plaintiff in alighting from defendant's car. The second instruction, given at the request of plaintiff, and criticised by defendant's counsel as being too general, was as follows: "2. If the jury shall find as stated in the plaintiff's first prayer, in estimating the damages, they may take into consideration the physical and mental sufferings of the plaintiff, the loss, if any, he may have sustained by reason of his confinement in consequence of his injury, such compensation as the jury may think he is entitled to because of his pain and suffering during his confinement in consequence of the injury, and such sum as the jury may think a fair and reasonable compensation for any injury they may find he has sustained, and if he has received injury, they may consider whether the injury is permanent in its nature or not, and assess the damages accordingly." The substance of the instruction asked by defendant and denied by the trial court appears in the opinion. Verdict and judgment for the plaintiff.

Henry Page and J. W. Crisfield, for the appellant.

Joshua W. Miles and James U. Dennis, for the appellee.

ALVEY, J. This was an action by the appellee against the appellant to recover for an injury sustained by the former, caused, as it is alleged, by the negligence of the latter. The accident occurred on the 11th of March, 1887, at Marion Station, on a branch road of the defendant. The plaintiff had been in the employ of the defendant, but had left the service before the accident occurred. The defendant was indebted to the plaintiff on account of service rendered, and when the defendant's pay-car came to the station to pay off employees, the plaintiff, in company with the station-agent, entered the car to receive the amount due him; and immediately after the amount was paid him, the car started, and while moving, the plaintiff jumped off and broke his leg. The testimony varies as to the length of time the car stopped at the station; some of the witnesses say about two minutes, and others from two to four minutes. The plaintiff jumped from the car-step, which is said by some of the witnesses to be about two and a half or three feet from the ground. When the plaintiff jumped off, the car had passed the end of a high platform, and was moving, according to the testimony of some of the witnesses, at the rate of about four and a half to five miles to the hour.

There was no question raised as to the legal sufficiency of the evidence to be submitted to the jury. The two questions submitted to the jury upon the evidence, by the instructions given, were: 1. Whether there was sufficient time allowed, or warning given, of the starting of the car, to enable the plaintiff, by the use of reasonable care, to get from the car in safety? and 2. Whether he did exercise reasonable care in his attempt to get off the car, under the circumstances of the case?

The plaintiff entered the car for a lawful purpose, and was therefore rightfully in the car for such time as was reasonably sufficient to enable him to transact the business for which he entered it. The defendant, by its agents and servants, was bound to afford reasonable time for the transaction of the business before moving the train, and was also bound to give proper warning of the purpose to put the train in motion, to enable the plaintiff, by the use of reasonable care and diligence, to leave the car without risk of injury to himself in

the act of getting off. If the defendant was negligent in the observance of these reasonable and necessary precautions, and such negligence caused the injury to the plaintiff, then, unless it be shown that the plaintiff, by his own want of care, directly contributed to the production of the injury, the defendant became liable: *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 27. The question of the negligence of the defendant, and also that of the contributory negligence of the plaintiff, appear to have been very distinctly and fairly put to the jury in the first and third of the prayers of the plaintiff, and the third prayer of the defendant, granted by the court, and by the substituted instruction of the court, in lieu of the first and second prayers offered by the defendant. Indeed, by these instructions, the whole law of the case was fully and fairly presented for the guidance of the jury; and we discover no error in the rulings thus made for which the judgment below should be reversed.

The second prayer of the plaintiff related to the measure of damages, and was granted by the court, and we do not understand that there is any specific error assigned in respect to that prayer, except that it is said to be too general and indefinite. But we fail to perceive that it is liable to such an objection.

The court rejected the defendant's fourth prayer, and in so doing we think it committed no error. By that prayer the court was asked to instruct the jury, that if they should find that the car was moving at least at the rate of five miles an hour at the time the plaintiff jumped therefrom, then such act of the plaintiff was negligence on his part, and their verdict should be for the defendant. This prayer excluded from consideration all the facts and circumstances of the case under which the plaintiff acted, except the single fact that he jumped from the car when it was moving at the rate of five miles per hour; and if the jury should find that fact, then the court was asked to say, as matter of law, there was such negligence on the part of the plaintiff as would preclude his right to recover without regard to the other facts of the case. But, in our opinion, all the facts and circumstances of the case were properly left to the consideration of the jury; and it was for them to determine, as matter of fact, whether the plaintiff, in jumping from the car, acted as a reasonably cautious man would do under like circumstances. This is the principle announced by this court in the case of *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53, and the decision of

that case is well supported by authority. It is doubtless a well-settled general principle, that if a passenger, or other person lawfully on a train, without any direction from the conductor, or other person in authority over the train, voluntarily incurs danger by jumping from the train while in motion, the railroad company is not responsible for injury resulting therefrom. But if the motion of the train is so slow that the danger of jumping off is not reasonably apparent, and the passenger, or other person, acts under the direction of the conductor or other person in authority, then the defense of contributory negligence is unavailing; and it is for the jury to determine whether the danger of leaving or boarding a train when in motion is so apparent as to make it the duty of the passenger or other person to desist from the attempt: Wharton on Negligence, sec. 380; *Johnson v. Railroad Co.*, 70 Pa. St. 357. The question, as one of fact, dependent upon all the circumstances of the case, was fairly submitted to the jury by the granting of the defendant's third prayer and the substituted instruction given by the court.

Finding no error, we affirm the judgment.

RAILWAYS — COMMON CARRIERS — MUST ALLOW REASONABLE TIME FOR PASSENGERS to leave the cars at their destinations: *Toledo etc. v. Baddeley*, 54 Ill. 19; 5 Am. Rep. 71; *Hurt v. St. Louis etc. R'y*, 94 Mo. 255; 4 Am. St. Rep. 374, and cases cited in note 381; *Raben v. Central etc. R'y*, 73 Iowa, 579; 5 Am. St. Rep. 708, and note.

RAILWAYS — PERSONS GETTING OFF MOVING TRAINS: See note to *Hurt v. St. Louis etc. R'y*, 4 Am. St. Rep. 381. *Hunter v. C. & S. V. R. R. Co.*, 112 N. Y. 371, 8 Am. St. Rep. 752, is hardly in accord with the principal case. It was there held that one who attempted to board a train then moving from four to six miles per hour must, as a question of law, be adjudged guilty of contributory negligence sufficient to preclude his recovery for an injury suffered, though the conductor told him "to jump on if he was going."

BOWIE v. HALL.

[69 MARYLAND, 433.]

STIPULATION IN A PROMISSORY NOTE TO PAY ALL COSTS AND EXPENSES OF COLLECTION, including attorneys' commissions, if the note should not be paid at maturity, is valid and enforceable.

William Stanley, for the appellant.

MILLER, J. In this case, suit was brought by the payee against the makers of the following note or instrument in writing: —

“ \$1,060.

UPPER MARLBORO, May 4, 1887.

“ Three months after date, we jointly and severally promise to pay to Francis M. Bowie, at the National Bank of the Republic of Washington, D. C., the sum of one thousand and sixty dollars, value received, with interest. And we further promise that if said note is not paid at maturity, we will pay all cost or expense of collecting the same, including attorneys' commissions, the same to be calculated and included in the judgment recovered upon said note in case of suit.

“ C. HALL.

“ H. W. CLAGETT.”

All errors in pleading were waived; but before the trial day one of the defendants paid the full amount of the note and interest, but refused to pay attorneys' fees. This, therefore, was the only question in controversy to be decided by the court. The court below decided against the recovery, and gave judgment in favor of the defendants. From that judgment the plaintiff has appealed.

In *Maryland Fertilizing etc. Co. v. Newman*, 60 Md. 584, this court held that a similar stipulation destroyed the negotiability of the note, but by no means decided that it was a void contract. On the contrary, after citing the cases of *Bullock v. Taylor*, 39 Mich. 137, and *Witherspoon v. Musselman etc.*, 14 Bush, 214, where a contract of this character in a note had been treated as a stipulated penalty, and declared void, the court said: “ But to declare such stipulations void in order to maintain the negotiable character of the note is certainly a strong thing for the court to do, unless it clearly contravened some established principle of law. Parties have the right to make their contracts in what form they please, provided they consist with the law of the land; and it is the duty of the courts so to construe them, if possible, as to maintain them in their integrity and entirety. While the instrument under consideration may not be a valid negotiable promissory note, it does not by any means follow that it is not a valid contract of another description.” The court then, though they affirmed the judgment, remanded the cause in order to allow the plaintiff to amend his declaration, and to declare on the special agreement as assignee thereof, instead of suing, as he had done, as indorsee of the note. And in *Maus v. McKellip*, 38 Md. 238, a like stipulation in a mortgage was expressly upheld.

But even if the question were a new one, we can discover

no ground whatever upon which to declare such a contract void. In the case before us, the interest on the sum lent, up to the maturity of the note, is less than half the most reasonable commissions the lender will have to pay an attorney for collecting it by suit or otherwise. So that, by default of the borrower, he would lose all the interest and part of the principal. What possible objection can there be in allowing parties to contract against a result like that? In our judgment such contracts violate no principle of law or public policy. It seems to us simply a stipulation intended to secure punctuality in the performance of the contract, and, as such, contains no element of oppression to the borrower. Its tendency, in fact, is to help him to borrow at a less rate of interest, as punctuality in payment is usually taken into consideration in fixing the terms of a loan. Nor can it be regarded as a cover to usury, for its effect is clearly not to put any money above the legal rate of interest into the pocket of the lender, but merely to enable him to get back his money, with legal interest, and nothing more.

We are not aware of any case in which such a contract has come before an English court; and this may result from what we believe to be the fact, that the practice of remunerating attorneys and solicitors for their professional services by a certain percentage on money collected by them for their clients by suits in court has never prevailed in England. In this country, however, such a practice has been commonly adopted. Contracts, therefore, like the present are not unusual here, and have become numerous in recent times. In some cases, their validity has been denied by the courts; but it seems they are sustained by a decided preponderance of authority. Counsel for appellant has, with commendable diligence, collected a number of authorities sustaining them (which we give), and doubtless others to the same effect may be found: *Huling v. Drexell*, 7 Watts, 129; *McAllister's Appeal*, 59 Pa. St. 204; *Smith v. Silvers*, 32 Ind. 321; *Clawson v. Munson*, 55 Ill. 394; *Camp, Glover, & Co. v. Randle & Co.*, 81 Ala. 240; *Miner v. Paris Exchange Bank*, 53 Tex. 559; *McGill v. Griffin*, 32 Iowa, 445; *Chase v. Whitmore*, 68 Cal. 545; *Peyser v. Cole*, 11 Or. 39. We are, therefore, of opinion the learned court below was in error in refusing to allow the plaintiff to recover these commissions in this case.

Judgment reversed, and new trial awarded.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTES — STIPULATION FOR ATTORNEY'S FEES. — Provisions for ten per cent attorney's fee for collecting notes renders them non-negotiable: *Maryland etc. v. Newman*, 60 Md. 584; 45 Am. Rep. 750; *Johnston v. Speer*, 92 Pa. St. 227; 37 Am. Rep. 675; *Morgan v. Edwards*, 53 Wis. 599; 40 Am. Rep. 781; *Woods v. North*, 84 Pa. St. 407; 24 Am. Rep. 201; *contra, Trader v. Chidester*, 41 Ark. 242; 48 Am. Rep. 38; *Seaton v. Scoville*, 18 Kan. 433; 26 Am. Rep. 779; *Stoneman v. Pyle*, 35 Ind. 103; 9 Am. Rep. 637; *Gaar v. Louisville etc.*, 11 Bush, 180; 21 Am. Rep. 209, and note 212; *Nickerson v. Sheldon*, 33 Ill. 372; 85 Am. Dec. 280. A stipulation in a promissory note for a stipulated attorney's fee at ten per cent upon the amount found due is of no legal effect, and the court will not enforce it: *Kimball v. Moir*, 15 Or. 427. In an action for the cancellation of a note, which provided for attorney's fees, and a mortgage, the proceeds of which were claimed both by defendant and intervenor, where it was agreed that plaintiff should pay intervenor the amount due, and that mortgage and note should be canceled, the court correctly refused to allow defendant any attorney's fees: *McCormick v. Lundburg*, 74 Iowa, 558. An instrument, "Promise to pay additional sum of ten per cent attorney fee," etc., was held not to be a promissory note: *First National Bank v. Gay*, 63 Mo. 33; 21 Am. Rep. 430.

STATE v. BALTIMORE AND OHIO RAILROAD COMPANY.

[69 MARYLAND, 494.]

NEGLIGENCE IS NOT TO BE IMPUTED TO A RAILROAD COMPANY FROM THE FACT THAT AN ENGINE AND TENDER WERE RUNNING BACKWARD ON A track through the country, where people were not expected and had no right to be on such track.

PERSON WALKING ON A RAILROAD TRACK IS A TRESPASSER, AND THE COMPANY'S SERVANTS ARE UNDER NO OBLIGATION to keep a lookout for his protection.

PERSON WALKING ON A RAILROAD TRACK MUST LOOK AND LISTEN FOR APPROACHING TRAINS. — His failure to do so is negligence of the grossest nature, and defeats his right to recover for injuries sustained, unless there is a want of reasonable care on the part of the employees of the company after becoming aware of the perilous situation of the party injured.

ACTION by the state for the use of Margaret Ricketts. Judgment for the defendant, under the instructions of the court.

Richard R. Beall, and James Dawson, for the appellant.

John K. Cowen, for the appellee.

ALVEY, C. J. The single question in this case is, whether, upon the evidence, there was a sufficient case made to require the court to refer it to the jury for their conclusion. No testimony was given except that upon the part of the plaintiff;

and upon that testimony the court was asked to instruct the jury that the negligence of the deceased directly contributed to his death, and the verdict should therefore be for the defendant. This instruction was given, and in giving it, we think the court committed no error.

The accident happened on the 20th of January, 1887, on the Metropolitan branch of the Baltimore and Ohio Railroad, about midway between the Washington Grove and Denwood stations, on that branch of the road. It was not at a crossing, but in the open country, where, as the witness states, "the railroad is perfectly straight, and the view in either direction is unobstructed for a distance of from three quarters of a mile to a mile." There were two witnesses who testified for the plaintiff as to the circumstances of the accident. The first, Beall, testified that he saw the deceased going towards Denwood Station, walking on the ends of the ties of the railroad, outside of the rails; "that when he first saw the man no train of cars was in sight, but immediately thereafter the Gaithersburg train came in view, running at a high rate of speed, and struck the man in the rear, who was then and there instantly killed; that the train continued on its way without stopping, and that the train-men could have seen this man or any one on the track for at least three quarters of a mile in a straight line before the point was reached where the man was killed. The wind was, at the time, blowing from the southeast, the direction in which in which the man was walking. The train was running with the tender in front of the engine, and witness saw no pilot on the tender, and heard no whistle blown or bell rung, or signal given." The other witness, Williams, testified that he was walking on the railroad track, on the occasion when the accident occurred, driving a horse attached to a dump-car on a tramway alongside the railroad, and which dump-car made a good deal of noise; "and that he was warned of the approach of the train by the vibration of the rails in time to escape permanent injury, and to secure his horse; that he was at first walking slightly behind the man, (the deceased), but at the time of the collision he was three or four ties in advance of him; and that he did not hear any bell rung, whistle blown, or signal given." There was also proof given to show that the deceased was a little hard of hearing; but this fact was wholly immaterial, unless it was shown that the servants of the appellee in charge of the train knew the fact of such infirmity, and that they recognized the deceased

on the track in time to save him by the use of reasonable care.

The fact that the engine and tender were running backward, on a track through the country, where people were not expected and had no right to be on the track of the road, cannot be regarded of itself as an act of negligence. The necessities of railroad operation may require such mode of moving trains under special circumstances; and we all know it is constantly done upon all the roads of the country: *Sullivan v. Pennsylvania R. R. Co.*, 5 Cent. L. J. 862; 2 Shearman and Redfield on Negligence, sec. 471. But even conceding such movement of the train to be negligent, the question is, Did it relieve the deceased of the consequences of his negligence in being unlawfully upon the appellee's railroad track, and his failure to use his senses to guard him against danger?

It is undisputed that the right of way where the accident occurred was the exclusive property of the railroad company, and consequently no person without authority had a right to be on the track, or to use it as a footway. The deceased, therefore, was a trespasser on the track, and was only entitled to such protection as a trespasser could rightfully claim. Being on the track wrongfully, the servants of the railroad company were under no obligation of duty to keep a lookout for his protection; but having voluntarily put himself in a place of danger and of peril to his life, he was bound to use his senses as the means of avoiding injury. Before a person attempts to cross a railroad track, he is required to look and listen for approaching trains; and his failure to observe this precaution is treated by the law as culpable negligence, and he enters upon the track at his peril: *Maryland Central R. R. Co. v. Neubeur*, 62 Md. 391; *Railroad Co. v. Houston*, 95 U. S. 697. But with how much greater force does the rule apply to a person who enters upon a railroad track, and, as matter of convenience to himself, walks along the track as upon a common highway or footway without observing the precaution of constant watchfulness for the approach of trains? In such case, the failure to use his senses cannot be otherwise characterized than negligence of the grossest nature, and such as will defeat all right of recovery for injury sustained, if such negligence is a direct contributing cause, except, indeed, where there has been a want of reasonable care under the circumstances by the employees of the company to avoid the injury after becoming aware of the perilous situation of the party injured. This is now

the well-established rule by a great number of cases upon the subject, and we need only refer to the cases of *State v. Baltimore etc. R. R. Co.*, 58 Md. 484; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375; *Illinois etc. R. R. Co. v. Godfrey*, 71 Ill. 500; *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59; *Chicago etc. R. R. Co. v. Hedges*, 118 Id. 5; *Barstow v. Old Colony B. R. Co.*, 143 Mass. 535; *Masser v. Chicago etc. R. R. Co.*, 68 Iowa, 602. Here it is not pretended that there was any difficulty in seeing the approach of the train, if the party had been at all watchful for it; for it is shown by the witness for the plaintiff that the road was straight, and the view entirely unobstructed in both directions for a distance of nearly a mile. The deceased, therefore, could not have been run down by the train if he had been in the exercise of care, and had used his senses for his protection.

It is true, the fact that the deceased was wrongfully on the track at the time of the accident did not relieve the employees of the company from all duty, under all circumstances, of using reasonable care to avoid collision with the deceased; but that duty could only arise from the time that the party was discovered in his peril by the employees in charge of the train. From that time those in charge of the train would be bound to use all reasonable care and effort to avoid the injury; and their failure in that respect would render the company liable for the consequences, notwithstanding the negligence of the deceased. But in this case there is an entire absence of all evidence to show that the presence of the deceased on the track was known to any of the employees on the train until after the accident had occurred. The fact that such knowledge on the part of the employees of the company, and that it was because of their failure to use reasonable care to avoid the accident that the injury was inflicted, were material facts, and necessary to make the plaintiff's case; and as there was no proof of these essential facts, the court could not do otherwise than instruct that the verdict should be entered for the defendant.

Judgment affirmed.

THE PRINCIPLES ANNOUNCED in the foregoing case were reapplied in *Baltimore etc. R. R. Co. v. State*, 69 Md. 551. In the latter case it appeared that the person killed was walking in the daytime on the railroad track, in the city of Baltimore, where the company was entitled to the exclusive right of way for the operation of its trains. The deceased was facing the train, which was approaching at a high rate of speed. For about a thousand feet

from the place where the accident occurred, the track was so situate that there was nothing to obstruct the view, and any one who looked down the track could have seen the approaching train. The speed of the train was in excess of that allowed by the city ordinance. There was a judgment for the plaintiff in the trial court, which was reversed on appeal. The opinion of the appellate court so far as it discussed the law of the case is as follows:—

“The decision of this case, to a considerable extent, depends upon principles that were involved in the case of *State v. Baltimore etc. R. R. Co.*, 69 Md. 494. In that case it was held that the place where the accident occurred, not being a crossing, but being the exclusive right of way of the railroad company, and the party killed being wrongfully upon the track, there was no duty incumbent upon the employees of the company to keep a lookout for the protection of trespassers upon the road; and therefore there could be no recovery, even though there was negligence in the running of the train, unless it was distinctly shown that the presence of the deceased upon the track became known to the employees on the train in time, by the use of reasonable care and effort, to avoid the collision. In other words, that the negligence of the deceased, in wrongfully walking upon the track, and failing to use his senses to discover the approach of the train, so far contributed directly to the production of the injury as to preclude the right of recovery. In support of this proposition a number of decisions of courts of high authority are cited in that case.

“In this case, the accident occurred on the 10th of October, 1887, within the limits of the city of Baltimore. It was in open daylight, the hour being a little after five o'clock, P. M. The place where the accident happened was not upon an open public street, nor at any public or usual crossing of the railroad track; but it occurred while the deceased was walking on the track, facing an approaching train, and where the railroad company had the exclusive right of way for the operation of its trains. The place where the accident occurred was not far from the southwestern limits of the city, and where the city has not been built up. The train that collided with the deceased was leaving the city, bound for Washington, and the deceased was going into the city; thus confronting the approach of the train. All the track of the defendant's road west of the bridge at the intersection of Ostend Street, as designated on the plat, is the private right of way of the defendant, and it is stated by the witnesses that it was about sixty or seventy feet west of the bridge that the accident happened. It appears that there was a small foot-path, much used by people in that neighborhood, along the north side of the tracks, and between the road-bed of the defendant and the tracks of another railroad company; but it is not a way in which the public had any rights, and it was only used by the implied license of the railroad company.

“There is really no material conflict among the witnesses as to the facts relating to the accident. Some of them, owing to their position, saw more of the occurrence than others, and there is some slight variation in the narrative given by them; but there is no real conflict as to the material facts of the case. It is shown that the deceased was seen just before the accident walking in the foot-path between the tracks of the defendant and those of the Annapolis Short Line Company, and at that time the train for Washington was approaching at quite a fast rate of speed. From the time the train got within about a thousand feet of the place where the accident occurred, it continued in full view, in its approach, to any one at or about the point of collision; and when this train was within a short distance, perhaps less than a hundred and fifty feet of the deceased, he stepped upon and crossed

the north track of the defendant's road, diagonally, to the south side thereof, and pursued his way on the ends of the cross-ties until he was struck and killed by the engine. All other persons at or about the scene of the accident heard and saw the approach of the train, and paid heed to it; the deceased being the only person who seemed not to be mindful of his danger, though immediately facing the rapidly approaching train. A more daring experiment, or grosser act of negligence, on the part of the deceased could scarcely be imagined.

"It is true, the train was running at a much higher rate of speed than that allowed by the ordinance of the city, and in this, it is conceded, there was negligence on the part of the defendant. But this disregard of the ordinance, and consequent act of negligence on the part of the defendant, did not excuse or in any way justify the glaring act of negligence on the part of the deceased. That has been ruled in many cases, and is now the settled law: *Railroad Co. v. Houston*, 95 U. S. 702; *Baltimore etc. R. R. Co. v. Mah*, 66 Md. 53, 60. The present is not unlike in principle the case put by Lord Chancellor Cairns, in the course of his opinion in the case of *Railroad Co. v. Slattery*, L. R. 3 App. C. 1166, referred to in *Bacon's Case*, 58 Md. 485, that if a train which ought to give signal by whistle when approaching a road crossing, or passing a station, were to pass without giving such signal, and a party were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, the judge ought to instruct the jury that it was the folly and recklessness of the party himself, and not the carelessness of the company, which caused his death. In such case, says the chancellor, 'the jury should not be allowed to connect the carelessness in not whistling with the accident to the man, who rushed, with his eyes open, on his own destruction.' So here, the train advanced in open view, but yet the deceased persisted in his course on the track, until he confronted the engine by actual collision.

"The case seems to have been tried upon the assumption, and so the argument for the plaintiff seemed to assume here, that it was the duty of the railroad company to keep a lookout for trespassers on its private right of way, and upon discovering the party upon the track who failed to leave it within a reasonable distance before he was reached, the train should have been brought to a stop. Doubtless there are many cases that could be suggested where it would be the duty of those in control of the train to stop it, if possible, in time to save a party found upon the track. But it is quite erroneous to assume that, in a case like the present, it was the duty of the train-men, upon seeing the party upon the track, to stop the train. From the time the deceased was discovered in his perilous situation, it was certainly the duty of those in charge of the train, by the use of reasonable effort, to avoid, if possible, a collision with him. This, in most cases, is done by the use of signals, — such as sounding the whistle or ringing the bell. But where a party is discovered on the track, in the exercise of full power of locomotion, and no impediment to his escape, those on the train may well act upon the assumption that he will use his senses for his protection, and get out of the way of danger before he is struck. If all railroad companies were bound to stop their trains upon discovering trespassers walking ahead upon their tracks, because such intruders might by possibility fail to get off the track in time to avoid being struck, it is difficult to say what would become of the many fast express trains that are moving over the country. Time-tables made to regulate the exact movement of trains would be subor-

minate to the convenience of pedestrians who might think proper to use the railroad tracks rather than other more lawful ways. But no such proposition has ever been maintained by any well-considered case of which we are aware.

"The second prayer of the defendant, the correctness of which was conceded by the plaintiff, and was granted by the court, asserts that the track where the accident occurred was the exclusive private right of way of the defendant, and that there was no evidence to show that the deceased had any right to be on such track. The fourth and fifth prayers of the defendant were also granted, in connection with the plaintiff's second prayer; and with the principles announced in those three instructions, which are plainly correct, we are of opinion that there was no sufficient ground for referring the case to the jury for any conclusion in regard to the evidence. As we have said, there was no substantial conflict in the evidence as to material facts; and assuming the truth of all the evidence on the part of the plaintiff, there was no ground whatever shown for recovery. All verdicts of juries must have rational support from the evidence in the cause; and where it is manifest to the court upon the plaintiff's own showing, and the uncontradicted evidence in the cause, that there is no rational ground upon which a verdict can be based for the plaintiff, it becomes the duty of the court to direct a verdict for the defendant. And therefore, upon the evidence in this case, we think the court below ought to have granted the defendant's first prayer, which asked that the jury be directed to render a verdict for the defendant. Upon the instructions given, we may say here, as was said by the supreme court in *Railroad Co. v. Houston*, 95 U. S. 702, where the testimony as to the contributory negligence was less gross and flagrant than in this case, that 'not even a plausible pretext for the verdict can be suggested, unless the court wander from the evidence into the regions of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant.'

"Seeing that there is an entire absence of any ground for the plaintiff's recovery, we shall reverse the judgment without directing a new trial."

RAILWAYS—ORDINARY CARE AND PRUDENCE IS REQUIRED OF PERSONS ABOUT TO CROSS RAILWAY TRACK: *O'Connor v. Missouri P. R'y Co.*, 94 Mo. 150; 4 Am. St. Rep. 368, and note; note to *Mynning v. Detroit etc. R'y Co.*, 8 Am. St. Rep. 804; note to *Kelley v. Michigan etc. R'y Co.*, 8 Am. St. Rep. 876.

RAILWAYS—TRESPASSERS UPON TRACK.—Trespasser upon track has no right to exact care of the railway company: *Harriman v. Pittsburg etc. R'y Co.*, 45 Ohio St. 11; 4 Am. St. Rep. 526, note; note to *Kelley v. Michigan etc. R'y Co.*, 8 Id. 876. Failure of railway company to give signals of their approaching cars is not negligence as to trespassers elsewhere than at crossings: *Shackleford's Adm'r v. Louisville etc. R'y Co.*, 84 Ky. 43; 4 Am. St. Rep. 189, and note 192.

FARMERS' PHOSPHATE COMPANY v. GILL.

[69 MARYLAND, 537.]

SALE, WHEN PASSES TITLE. — If a buyer purchases or orders a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract the specific quantity by delivering them to a vessel designated by the buyer, or in the absence of such designation, to a common carrier, the mere fact that the contract contains a stipulation that they are to be paid for by note or in cash on arrival does not prevent the title from passing, or make either payment or arrival a condition precedent thereto. The goods become the property of the vendee, and are at his risk from the time they are put on board the vessel.

TITLE PASSES BY A SALE, ON DELIVERY OF THE PROPERTY ON BOARD A VESSEL FOR THE VENDEES, and indorsement and delivery of the bill of lading to them, although the contract of sale stipulates that the property shall be weighed at the seller's expense, and (being river-rock phosphate) that it shall contain a certain percentage of bone phosphate, or in the event of its falling below that percentage, that a proportionate allowance shall be made from the contract price.

TROVER: Judgment for the plaintiff.

F. C. Slingluff, for the appellant.

D. K. Este Fisher and William A. Fisher, for the appellee.

MILLER, J. On the 4th of June, 1887, the firm of Symington Brothers & Co., of Baltimore, manufacturers of fertilizers, made an assignment of all their property to Mr. John Gill for the benefit of their creditors, and the question in this case is, whether a cargo of South Carolina river-rock phosphate passed to the assignee under this assignment. The question is raised by an action of trover brought by the Farmers' Phosphate Company, the vendor of the Symingtons, against Mr. Gill, their assignee, for the conversion of this property. The facts essential to be stated, and about which there seems to be no dispute, are as follows: The contract of sale made in Baltimore on the 15th of February, 1887, by Mr. Cottman, who was the broker for both vendor and vendees, is in these terms:—

“Sold to Messrs. Symington Brothers & Co. for account of Farmers' Phosphate Company. A cargo of about five (500) hundred tons undried river-rock phosphate, delivered alongside buyers' vessel at Dale's Creek @ \$4.50 per ton, 2240 lbs. For delivery latter part of this month or 1st of March, 1887. Rock guaranteed 60 per cent bone phos. of lime on dry basis; should rock run below 60 per cent, proportionate allowance to

be made. Rock to be weighed here as landed, by sworn weigher, at seller's expense. Payable by note to buyer's order, at four (4) months from date of bill of lading, adding interest, or cash on arrival here. J. H. COTTMAN."

The Symingtons then, on the 12th of March, 1887, chartered a vessel to bring this cargo from Dale's Creek, Coosaw River, South Carolina, to Baltimore, the charterers paying freight, etc. The vessel arrived at Dale's Creek the latter part of April, and completed the lading of her cargo on or before the 7th of May. On this last-mentioned day, the master made out a bill of lading, whereby he acknowledged the receipt of the cargo from the Farmers' Phosphate Company, to be delivered at Baltimore "unto Symington Brothers & Co., or to their assigns." This the master delivered to the Phosphate Company, who indorsed it, "Deliver to the order of J. H. Cottman" (the broker who effected the sale), and he indorsed it, "Deliver to the order of Symington Brothers & Co.," and delivered it to them on the 14th of May, one week after its date. It also appears that the Symingtons insured the cargo for their own benefit.

The vessel arrived at Baltimore on the 24th of May, and immediately commenced discharging her cargo at the wharf of the Symingtons, they having paid the freight thereon. As the discharge proceeded, the rock was weighed, and there was also an analysis of it made by a chemist, which showed that it was above the standard fixed by the contract. The discharge was completed on the 31st of May; and on the same day, Cottman made and sent to the Symingtons a bill for the phosphate. Not receiving any reply for several days, he telephoned them on the morning of the day on which they had executed their assignment to know whether they were going to pay for the cargo in cash or by note, and received a reply that they had something to say to him on the subject. He immediately went to their office, and was surprised to learn they had made an assignment. He then asked them to give him their note for the cargo; but they declined to do this, as they did not think it would be right for them to do so after they had assigned their property for the benefit of all their creditors.

Subsequently, on the 9th of June, the Phosphate Company, by their counsel, made demand on Mr. Gill, the assignee, for the property, and on the following day, the Symingtons wrote and mailed a letter to the company, inclosing their note for

the cargo, made out in accordance with the terms of the contract of sale; but the company, declining to receive this note, returned it to the assignee, and brought this action of trover.

Upon these facts, the question is, Was the title to this property vested in the Symingtons when they executed their assignment? or was it still in the Phosphate Company, the vendor? The question is an interesting one, and has been exceedingly well argued. On the part of the appellant company, it is contended that, by the terms of the contract, the sale is conditional, and that no title vested in the buyers, because the condition of paying by note or in cash had not been complied with or waived. On the other hand, counsel for the appellee deny that such is the proper construction or effect of the contract, and contend that the title passed by delivery of the cargo on board the buyers' vessel at Dale's Creek, and if not by such delivery alone, it clearly did when accompanied or followed by insurance for the buyers' benefit, and transmission to them of the bill of lading.

We think the law is well settled that where a buyer purchases or orders a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract the specified quantity by delivering them to a vessel designated by the buyer, or, in the absence of such designation, to a common carrier, the mere fact that the contract contains a stipulation that they are to be paid for by note or in cash on arrival does not prevent the title from passing, or make either payment or arrival a condition precedent thereto. In such case the goods become the property of the vendee, and are at his risk from the time they are put on board the vessel: *Magruder and Brother v. Gage*, 33 Md. 344; *Appleman v. Michael and Brother*, 43 Id. 281; *Dutton v. Solomonson*, 3 Bos. & P. 584; *Fragano v. Long*, 4 Barn. & C. 219; *Alexander v. Gardiner*, 1 Bing. N. C. 671. In the case last cited there was a stipulation in the contract that the goods were to be paid for "by a bill at two months from the date of landing." The goods were shipped from Sligo, in Ireland, to London, and while in transit were lost or damaged by shipwreck. In an action by the vendor against the vendee for goods bargained and sold, this term of the contract was relied on by the defendant, but Tindal, C. J., said, "the object of that stipulation was merely to fix the time of payment, and not to make the landing a condition precedent"; and added that for that point it is enough to refer to the decision in

Fragano v. Long, supra. In this view all the other judges concurred.

If, therefore, there was no other stipulation in the contract, the case would be free from difficulty. But there are two other clauses introduced for the purpose of ascertaining the exact amount to be paid by the vendees. The first stipulates that the cargo shall be weighed in order to find out the number of tons to be paid for at the stipulated price, and the second requires its quality to be ascertained. As to the latter provision, it must be noticed that it gives the vendees no right to reject the rock if it did not come up to the prescribed standard, but simply secures to them a proportionate abatement in the price if it fell below it. What, then, is the effect of these stipulations on the transfer of title? This presents the only real difficulty in the case. Where the agreement is for the sale of goods, and also for the performance of other things, it becomes important to ascertain whether the performance of any of these things is meant to precede the vesting of title or not. This is a question of the construction of the agreement, and it may often happen that the parties have expressed their intention in a manner that leaves no room for doubt; when, however, they have not done so in express terms, the intention must be collected from the whole agreement, and for this purpose (as stated by Lord Blackburn in the recent edition of his book on sales) the English courts have, since the beginning of the present century, adopted two rules of construction, both derived from the civil law. The first is, that where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property. The second is, that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they ought to be accepted. The learned author approves the first rule, but suggests that the second was hastily adopted from the civil law without adverting to

the great distinction made by the civilians between a sale for a certain price in money and an exchange for anything else,—a distinction which is not recognized by the English law. He remarks that in general weighing, etc., must, from the nature of things, be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property; and he intimates very strongly that in his judgment this second rule has no foundation in reason: 2 Blackburn on Sales, 2d ed., 127, 128.

The view thus taken by Lord Blackburn is supported by the very vigorous opinion of Cockburn, C. J., in *Martineau v. Kitching*, L. R. 7 Q. B. 449, in which he declared he would not give way to a rule which appeared to him to militate against principle, and to be inconsistent with common sense and convenience; and he insisted that if you can gather from the whole circumstances of the transaction that the buyer and seller intended that the property should pass, and the price should be afterwards ascertained by measuring or weighing, there was nothing in principle, in common sense, or practical convenience to prevent that intention from having effect. The other judges did not dissent, but thought the case before them could be decided on other terms of the contract without determining whether there was any inexorable rule of law that the property will not pass where the price or amount to be paid remains to be ascertained by weight or measurement.

In this country Mr. Newmark, in his recent work on sales of personal property, after stating the English rule, subjects it to the qualification that it applies in cases where there is no evidence tending to show the intention of the parties to make an absolute and complete sale, without performance of the acts of weighing or measuring: Newmark on Sales, sec. 74. We have also American decisions by courts of the highest authority which hold broadly that the performance of these acts, where provided for in the contract, is not essential to the transfer of title. Such, as we understand it, is the decision of the supreme court in *Leonard v. Davis*, 1 Black, 476. In that case there was a sale by written contract of a large quantity of pine logs lying in and near a boom, which it was supposed would make about one million four hundred and forty-four thousand feet of lumber in board measure. The contract specified one price per thousand for those logs that were afloat in the boom, and another for those on the bank and in the

marsh near the boom. It was also a part of the contract that the logs should be counted, measured, and scaled by the boom-master. The suit was by the vendors against the vendees upon this contract for the purchase-money of all the logs. The court below instructed the jury that the contract was executory, and that the title did not pass until the logs had been measured, but the supreme court reversed this ruling, and held that it was a sale without condition; that the measurement was simply to ascertain the amount to be paid by the vendees, and that the title to the logs passed to them as soon as the contract was signed, and there had been a symbolical delivery thereunder. Again, in *Hatch v. Oil Co.*, 100 U. S. 135, the same court reiterated the doctrine that where it appears that there has been a complete delivery of the property in accordance with the terms of sale, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rate specified in the contract. To the same effect are the New York cases of *Crofoot v. Bennett*, 2 N. Y. 258, and *Burrows v. Whitaker*, 71 Id. 291.

But taking the rule with the qualification stated in *Newmark on Sales*, we find in this case abundant evidence to show that it was the intention of the parties that the title should pass before the goods had been weighed and tested in Baltimore. The buyers chartered a vessel to bring the cargo from South Carolina to Baltimore, insured it for their own benefit, and became responsible for the freight. But what is more important, and more significant as indicating the intention of the vendor company, they had a bill of lading made out by the master as soon as the vessel was loaded at Dale's Creek, stating on its face that the cargo was to be delivered to the vendees or to their assigns, and procured the same to be delivered to the Symingtons within a week from its date. Now, it may be true that the transmission of a bill of lading may not in all cases be absolutely conclusive of title as between vendor and vendee, or consignor and consignee, yet the implication is almost irresistible that the motive of the vendor, when the bill is taken in the name of the vendee, is to vest title in the latter free from all conditions: *Key v. Cotesworth*, 7 Ex. 595, and note. As a general rule, a bill of lading operates a transfer of the property to the party in whose favor it is drawn, and to whom it is delivered. Citation of authority on this point is unnecessary. If the vendors in this case had wished

to prevent the property from passing, and to retain the right to deal with it after shipment and while *in transitu*, they should by the bill of lading have made the cargo deliverable to their own order, and have forwarded the same to an agent of their own, with directions to retain it until the cargo had been finally delivered, weighed, tested, and paid for in Baltimore: *Ex parte Banner*, L. R. 2 Ch. Div. 288. But this they did not do, and all the circumstances of the transaction show it was the intention of both parties to have the cargo become the property and be at the risk of the vendees from the moment it was put on board the carrying vessel. In fact, it was for the manifest interest of the vendors that this should be the case; for if the cargo had been lost by shipwreck of the vessel, they could have made the vendees responsible therefor in an action for goods bargained and sold, and there would have been no insuperable difficulty in the way of their recovery.

Upon the whole case, therefore, our opinion is, that this cargo became the property of the Symingtons from the time it was delivered on board their vessel at Dale's Creek, and consequently passed under their deed of assignment. The case is unlike that of a sale "for cash on delivery" considered in *Powell v. Bradlee*, 9 Gill & J. 220, and we think it is also distinguishable in material facts and circumstances from that of *Whitney v. Eaton*, 15 Gray, 225, so much relied on by counsel for the appellant.

It follows, therefore, from the undisputed facts of the case, that this action cannot be maintained, and consequently there has been no ruling prejudicial to the appellant made by the court below in its action upon the prayers.

Judgment affirmed.

SALES—WHEN TITLE PASSES: See note to *Blackwood v. Cutting Packing Co.*, 76 Cal. 212; *ante*, p. 199.

AM. ST. REP., VOL. IX.—29

CASES
IN THE
SUPREME COURT
OF
IOWA.

BARNES v. HEKLA FIRE INSURANCE COMPANY.

[75 IOWA, 11.]

PLEADING AND PRACTICE — CONTINUANCE FOR PURPOSE OF OBTAINING EVIDENCE. — Under Iowa practice, if the petition is amended, changing the issues, and the defendant has additional evidence which he desires to take to meet the change of issues, he must so show by affidavit; and he is not, as a matter of right, entitled to a continuance for the purpose of obtaining such evidence.

PLEADING. — **PARTY IS NOT ESTOPPED, BY BRINGING ACTION AT LAW, FROM AMENDING** his pleadings before the case has finally been submitted to the court, so as to change it into an action in equity.

INSURANCE — REFORMATION OF POLICY TO CONFORM TO CONTRACT. — The defendant's agent contracted with the plaintiff for insurance on the latter's property to the amount of three thousand dollars in several companies which the agent represented, and issued the policy in question to the plaintiff for part of that amount, containing a provision that the policy should be void if the insured should obtain additional insurance without the written consent of the company. It was clearly understood, however, that the plaintiff was to have the right to obtain additional insurance, but the required provision was omitted from the policy by mistake or oversight of the defendant's agent. In an action on the policy, it was held that the plaintiff had a right to rely on the agent's writing the policy in accordance with the contract; and because he failed to read the policy and discover the omission therein, he was not guilty of such negligence as would bar him of the right to have the policy reformed, and the omitted provision inserted.

T. B. Perry, for the appellant.

Henry L. Dashiell, for the appellee.

SEEVERS, C. J. This action, as originally commenced, was at law, and a recovery was sought on a policy of insurance.

The defendant pleaded that the policy contained the following provisions: "This policy shall be void unless the consent is indorsed in writing by this company in each of the following instances: If the assured have, or shall hereafter obtain, any other policy or agreement for insurance, whether valid or not, on the property insured, or any part thereof." The defendant further pleaded that after the issuance of the policy in question, the plaintiff had procured additional insurance on the property insured, and therefore the policy was void. The plaintiff filed an amendment to the petition, alleging that, at the time the contract of insurance was entered into and the policy issued, it was agreed between the plaintiff and defendant that the former should have the right to take out additional insurance on the property, and that the stipulation for additional insurance was "omitted from the policy by mistake, oversight, and through the fault of defendant"; and a reformation of the policy was asked. The defendant denied the allegations of the amended petition, and also pleaded that the plaintiff, having knowledge of the matters pleaded, was estopped from setting the same up, because he had elected to prosecute an action at law on the policy, and having made an election of remedies, he was bound thereby, and also because of his negligence in failing to discover the alleged mistake, and therefore he was not entitled to equitable relief. The cause was thereupon transferred to the equity docket, and was tried as such. There was a trial at the February term, 1887, and the cause was submitted to the court upon written arguments to be filed in vacation, the plaintiff waiving the opening argument. At the time of filing a reply to defendant's argument, the plaintiff filed a further amendment to the petition, stating that at the time the contract of insurance was entered into, the defendant was informed of the intention of plaintiff to take out additional insurance, and verbally assented and agreed thereto. The allegations of this pleading were denied by defendant, and, the cause not having been decided in vacation, the plaintiff insisted upon its immediate submission. To this the defendant objected, on the ground that the issue had been changed since the evidence had been taken, and that it had the right and desired to take evidence in the form of depositions. The court directed the case to be submitted.

1. The defendant contends that the court abused its discretion in ordering the submission of the cause at the time and

in the manner it did. Under the practice in this state, as we understand, the defendant was not entitled to a continuance or postponement of the submission of the cause as a matter of right; and this is what was asked. If the defendant had additional evidence it desired to take and introduce, it should have so shown by affidavit. Failing to do this, the court properly directed the case to be submitted.

2. The defendant contends that, as the plaintiff elected to bring an action at law on the policy, he cannot, by amended pleadings, ask a reformation of the policy, and have the case tried in equity. Conceding that the plaintiff had knowledge of the fact that the defendant asserted that it would rely on the defense it did, still, we think he could bring an action at law on the policy, and ascertain certainly whether defendant would plead such defense or not before resorting to equity. He could not know what the defense would be before it was pleaded. Under the statute in relation to amendments, we have no hesitation in holding that a party is not estopped by bringing an action at law from amending his pleadings before the case has finally been submitted to the court, so as to change it into an action in equity. We feel confident that the universal practice is in accord with this view.

3. The evidence shows that the policy was issued by one Nelson, who was fully authorized to do so, and he therefore had the right to determine the premium, and in fact do all that defendant, or any of its officers, could do in relation to the contract of insurance. We find, from the evidence, that it was agreed between the plaintiff and Nelson that the former should have insurance on the property to the amount of three thousand dollars. The rate of premiums was agreed upon. The policy sued on was then written and delivered to the defendant, and in a month or two the other policies in other companies represented by Nelson were written and delivered to the plaintiff. That the plaintiff was entitled to and had contracted for such additional insurance is rendered certain, for the reason that Nelson so stated and wrote in a book designated as his insurance register; but he testifies that he failed to so state in the policy. Nelson, as the authorized agent of the defendant, wrote the policy. The plaintiff relied on him to select the companies, and write the policy in accordance with the contract, and we think he had the right to do so; and because he failed to read the policy and discover the omission therein, and its terms and conditions, he is not

guilty of such negligence as will bar him of relief, as the defendant contends. It is true, it was not agreed between Nelson and the plaintiff, in terms, that there should be a stipulation in the policy that the latter had the right to obtain additional insurance, but it does not follow that the policy cannot be reformed, and such provision inserted therein. It was clearly understood or implied that the plaintiff was to have a valid policy of insurance, with the right to obtain additional insurance. This was the contract, and whatever provisions were necessary to make it effectual should have been inserted in the policy. Nelson, for the company, impliedly so agreed, and he should have so written the policy. The required provision was omitted by mistake or oversight. Nelson had the power to make such a contract, and he acted in good faith, but simply failed to draught the policy in accordance with the contract. The plaintiff has the right and is entitled to the benefits of the contract, and cannot be deprived thereof through the fault or negligence of the defendant. If the defendant was a natural person, and had entered into the contract, and had written the policy under the circumstances above stated, it seems to us a reformation could not be successfully resisted. For all the purposes of this case, Nelson must be regarded as the defendant. It therefore had notice of the actual contract, and is bound by its terms and conditions. The plaintiff is entitled to a decree reforming the contract, and to a judgment for the amount found due by the district court. The defendant must pay the costs of this appeal.

Modified and affirmed.

INSURANCE—REFORMATION OF CONTRACT FOR.—A MISTAKE, IN ORDER to authorize a court of equity to reform a contract of insurance, must be one made by both parties, or it must be a mistake of one party in connection with the fraud of the other: *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; 14 Am. Rep. 249. Where a policy is made out by mistake in the name of the partner applying therefor instead of the partnership, a court of equity will decree its reformation so as to cover the partnership interest, even after loss: *Keith v. Globe Ins. Co.*, 52 Ill. 518; 4 Am. Rep. 624. Equity will interpose to reform contracts of insurance on account of mistake and fraud, especially where policy is drawn up in a form different from the application: *National F. I. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 289; *Cooper v. Farmers' Mut. F. Ins. Co.*, 50 Pa. St. 299; 88 Am. Dec. 544. Errors in reducing contract of insurance to writing may be corrected by the court: *Lippincott v. Insurance Co.*, 3 La. 546; 23 Am. Dec. 467. Correction of mistakes in policies of insurance, as well as in other written instruments, is within the jurisdiction of equity: *Phoenix Ins. Co. v. Gurnee*, 1 Paige, 278; 19 Am. Dec. 431; *Parsons v. Hoerner*, 2 Root, 1; 1 Am. Dec. 58.

CITY OF DAVENPORT v. RICE.

[75 IOWA, 74.]

PEDDLER IS ITINERANT INDIVIDUAL, ORDINARILY WITHOUT LOCAL HABITATION or place of business, who travels about with merchandise for the purpose of selling it.

PEDDLERS — MUNICIPAL ORDINANCE. — PERSON IS NOT PEDDLER, WITHIN MEANING OF CITY ORDINANCE imposing a fine for hawking and peddling goods without a license, who, being in the employ of a resident mercantile establishment, calls on citizens and solicits orders for goods kept for sale by it, and who usually carries samples with him, although the ordinance declares such acts to be peddling.

PROSECUTION under a city ordinance for peddling and hawking goods without a license. The opinion states the case.

L. M. Fisher, for the appellant.

St. John, Stevenson, and Whisenand, for the appellee.

ROTHROCK, J. The cause was tried by the court without a jury, and it is submitted upon appeal to this court upon the findings of fact and conclusions of law by the district court, which are as follows: —

“ For several years a business association or firm, known as the Adams Manufacturing Company, has kept a retail store or wareroom in the city of Davenport, and a stock of miscellaneous house-furnishing goods therein for sale, on which stock it has been taxed by the city in the annual tax levy on taxable property, and has also paid a retailer's license tax under the city ordinance providing therefor. At the time of and before the commencement of this prosecution, the defendant, Rice, was in the employ of the said Adams Manufacturing Company, which employed him and a number of other persons to call on citizens of Davenport at their houses or places of business, and solicit orders for goods of the various kinds kept for sale by said company; said solicitors usually carrying with them for exhibition a sample or samples of one or more of such classes of goods, and said Rice was actually engaged in soliciting and taking orders. When an order was obtained, it was filled by said company by delivery from their stock of goods above mentioned. Sometimes the identical sample carried by the solicitor for exhibition was, if desired by the customer, sold and delivered to him by the solicitor. But it is not satisfactorily proved that this had ever been done by this defendant, Rice. At the time of said Rice's arrest by a police-officer of said city, preliminary to this prosecution, he was

found on a street of said city, having in his possession a clock from the stock of said company, which he was taking to a resident in said city, at her residence, who had informed another employee of said company that she wished to purchase a clock; and said defendant was about to visit her, with said clock as a sample, in order to solicit her order for a clock, to be sold to her by said company. Neither the defendant nor the company, at the time of beginning this prosecution, held any license as a peddler or hawker from said city. The ordinance of said city on which the prosecution is founded, so far as material to the case, is as follows (chapter 28, section 9, Revised Ordinances of City of Davenport of 1884):—

“ ‘Sec. 9. No person shall hawk or peddle within the limits of this city any goods, wares, merchandise, or other articles, save and except newspapers and farm or garden produce raised by the seller, without first having procured a license therefor.

“ ‘(a) The charge for said license shall be as follows: For one day, two dollars; for one week, five dollars; for one month, ten dollars.

“ ‘(b) Said license shall be procured in the manner provided in section 2 hereof.

“ ‘(c) Soliciting orders for future delivery of goods shall be deemed and taken to be peddling within the meaning hereof; and the burden of proof, where the fact of soliciting is shown, shall be upon the defendant, and he will be required to show that the terms or provisions of this section were not by him violated.

“ ‘(d) Any person found guilty of violating any of the provisions of this section shall be fined in a sum not exceeding twenty-five dollars, and shall be imprisoned until the same is paid.’

“ On the foregoing facts, the court is of the opinion, as matter of law: 1. That the facts do not show that the defendant was a ‘peddler’ or ‘hawker’ within the meaning of the clause of the city charter authorizing the city to license, tax, and regulate . . . hawkers, peddlers, etc.: *Town of Spencer v. Whiting*, 68 Iowa, 678; *Commonwealth v. Farnum*, 114 Mass. 267; 2. That said facts do not show any violation by said defendant of any valid provisions of said ordinance; 3. That the city council had no power, under the city charter, to enact by said ordinance that ‘soliciting orders for future delivery of

goods shall be deemed and taken to be peddling within the meaning hereof'; such soliciting not being 'peddling' within the proper meaning of said word as used in the charter: *Mays v. Cincinnati*, 1 Ohio St. 272; 4. Defendant is entitled to judgment of acquittal herein.

[Signed]

"J. N. ROGERS,
"Judge Seventh District."

It appears, from the statement of facts, that the Adams Manufacturing Company is a resident mercantile establishment occupying a store or warehouse, with its stock therein for sale, the same as other resident merchants. It employed the defendant and others to call on citizens of Davenport, and solicit orders for goods of the various kinds kept for sale by said company. These solicitors usually carried with them samples of the goods offered for sale, and when an order was obtained, it was filled by the company from their stock of goods at their store. A peddler is an itinerant individual, ordinarily without local habitation or place of business. The only difference between the company represented by the defendant and any other resident merchant was, that, for the purpose of securing business, the company sent its salesmen or clerks to the residences of the people to solicit purchasers for its wares. This is not unusual with some of the very best retail grocers. It is true, their agents and drivers may not carry samples, but we fail to see why this should make any difference. Webster defines a peddler to be "one who peddles; a traveling trader; one who carries about small commodities on his back or in a cart or wagon, and sells them." Worcester: "A traveling merchant; one who travels about the country carrying commodities for sale." Johnson: "One who travels the country vending small commodities." Bouvier defines peddlers to be "persons who travel about the country with merchandise for the purpose of selling it." Under these definitions we suppose that if an itinerant person should deposit his goods in a car or room, and from that place as a depository he should take his wares through the city, from place to place, for sale, he would be a peddler. But the establishment represented by the defendant had its operators where its goods were exposed for sale, and where they were actually sold, and the solicitation of orders for goods by sample was in no sense peddling. The authorities cited in the findings of the court fully support the conclusion made by the learned district judge who tried

the case. Indeed, we think the case of *Town of Spencer v. Whiting* is in principle conclusive upon the question.

Affirmed.

MUNICIPAL CORPORATION CANNOT, BY ORDINANCE, DECLARE THAT A NUISANCE which is not one in fact: *Tissot v. Great etc. Telephone Co.*, 39 La. Ann. 996; 4 Am. St. Rep. 248.

HENRY v. SIOUX CITY AND PACIFIC RAILWAY Co.

[75 IOWA, 84.]

RAILROAD COMPANY — NEGLIGENCE. — IT CANNOT BE SAID, AS MATTER OF LAW, that brakeman in employ of railroad company was guilty of contributory negligence, where, in obedience to his conductor's orders, he mounted the front end of a train of freight-cars, and went to the rear of the train, descended, and made a coupling with a standing car, but in so doing was injured by reason of the speed at which the train was moving; it appearing that when he mounted the train he had reason to believe the conductor would follow him, as was his custom in such cases, and slacken the speed of the train; and although, by a glance to the rear when he was about to descend from the cars he could have seen that the conductor had not gone on top of them, and that, if he had noticed the cars as they approached him, he might have seen that their speed had not been reduced.

RAILROAD COMPANY — EVIDENCE. — QUESTION WHETHER RATE OF SPEED OF MOVING TRAIN WAS DANGEROUS at time of injury to plaintiff is in the nature of a conclusion to be drawn from the facts proven, and such others as are in the common knowledge of all men; and it is the duty of the jury to draw that conclusion. The opinions of witnesses qualified by their experience to express an opinion on the subject are competent evidence; but the jury are not absolutely bound to accept such opinions, or to be governed by them in forming their conclusion.

EVIDENCE. — FACT THAT PLAINTIFF, IN ACTION FOR PERSONAL INJURY, CONTRADICTIONED HIS TESTIMONY given on a former trial in a material point affects only his credibility as a witness, and is a proper matter for the consideration of the jury, after hearing his explanation of the contradiction.

APPELLATE COURT WILL NOT DISTURB FINDING OF JURY on a question as to the credit which ought to be given to the evidence.

DAMAGES — VERDICT NOT EXCESSIVE. — A verdict for eight thousand dollars damages, awarded in an action for personal injuries to the plaintiff, who was, at the time of the accident, a strong and active man, nineteen years of age, the injuries causing him excruciating pain for a long time, and compelling him to submit to a surgical operation by which a portion of the ankle-bone was removed, and the joints of his ankle and foot stiffened, making him a cripple for life, and unfitting him for manual labor, for which only he was qualified, is not excessive, and will not be disturbed on appeal.

ACTION for damages for personal injuries sustained by the plaintiff, and alleged to have been caused by the negligence of the defendant. The facts appear in the opinion.

Joy, Wright, and Hudson, and John R. Hawley, for the appellant.

E. C. Herrick and E. F. Gray, for the appellee.

REED, J. This cause has twice been in this court before the present appeal: See 66 Iowa, 52, and 70 Id. 233. The accident occurred while plaintiff was making a coupling. A number of cars were moved from the main track to a side-track, by the operation known as "kicking in." Plaintiff, who was the only brakeman on the train, removed the pin which coupled the cars to the engine, and gave the signal to the engine to back, and when the cars were run onto the side-track, he went on top of one of them, and proceeded to the rear end of the last car, where he descended to the ground, and ran to a standing car, for the purpose of coupling it to the others. He succeeded in making the coupling, but was struck by the moving cars and thrown to the ground, and the trucks passed over one of his feet, inflicting a serious and permanent injury. His claim is, that he made the coupling in obedience to a direction of the conductor, who was his superior, and whose orders he was required to obey; that it was the custom, in the performance of such work, for the conductor, when there was but one brakeman on the train, to go upon the moving cars, and, by applying the brakes, reduce their speed so that the coupling could be made with safety; and that when the conductor gave him the order to make the coupling in question, he indicated by his actions that he would follow him onto the cars for that purpose, but that he neglected to do so, and that the injury was in consequence of that neglect. He also claims that when he started to make the coupling, he believed that the conductor would perform that duty, and that when he went between the cars, he did not know that it had not been performed, or that the speed of the cars had not been reduced.

1. It was insisted in the argument that the evidence shows conclusively that the plaintiff was guilty of such negligence contributing to the injury as defeats all right of recovery. Plaintiff testified that when he went upon the cars, they were moving at a rate of from four to five miles per hour, and the jury found specially that they were moving at four and one

half miles. He also testified that when he reached the top of the car and got upon his feet, the conductor was by the side of the car, with his hand on the ladder, and was apparently about to follow him, and that it had been the uniform custom during the time he had worked upon that train, which was ten days, for the conductor to go upon the cars under like circumstances and apply the brakes. Also, that he did not notice when he descended from the cars that the conductor had not gone upon them; and that, from the time he reached the ground until he was struck and thrown down, his attention was given to the matter of the coupling, and that he did not notice that the speed of the cars had not been reduced. If these are the facts of the occurrence, it cannot be said, as matter of law, that plaintiff was guilty of contributory negligence; but the question whether he was so guilty is in the nature of an ultimate conclusion, to be determined from the facts; and it was the province of the jury to determine it. It is true that by a glance to the rear when he was about to descend from the cars he could have seen that the conductor had not gone on top of them, and that if he had noticed the cars as they approached him, he might have seen that their speed had not been reduced; but if it was the duty of the conductor to go upon the cars and apply the brakes, and he had been led by his conduct to believe that he was about to perform that duty, he was not necessarily negligent because he proceeded to do the work assigned to him without first ascertaining whether he had performed it: *Beems v. Chicago etc. R'y Co.*, 58 Iowa, 150. The facts as testified by plaintiff do not bring the case within *Nichols v. Chicago etc. R'y Co.*, 69 Id. 156. In that case, the evidence of the plaintiff showed, without any doubt, that he knew when he went between the cars that his signal to reduce the speed had not been understood, or was being disregarded. And the court instructed the jury that if he knew that fact, or by the exercise of reasonable diligence might have known it, he could not recover. While we approved that instruction, we held that the verdict could only have been arrived at by totally disregarding it. But there was no claim, as there is in this case, that plaintiff had been led to relax that diligence in the matter which otherwise would have been required of him by the conduct of the co-employee whose duty it was to slacken the speed of the cars.

2. But it was insisted that plaintiff's testimony to the effect

that he did not know when he went between the cars that the speed had not been reduced ought not to be accepted as true, for the reason that, when testifying on the former trials, he admitted that he did not know that fact. Portions of his testimony on the former trials were read to the jury on this trial, and it must be admitted that it shows that he stated, on the first trial at least, that he knew when he went between the cars that the speed had not been reduced. But he claimed and testified that when he gave that testimony he was still suffering from the effect of his injury, and that he did not understand, when he gave that answer, that the question referred to that particular time, but understood that it referred to the time when he alighted from the cars. In any event, however, the fact was one affecting his credibility as a witness, and was for the consideration of the jury; and we cannot say, in view of their verdict, that his present statement is false.

3. There was no direct evidence that the rate of speed at which the cars were moving was dangerous, although plaintiff and one other witness testified that the speed at which cars were ordinarily moved when a coupling to a standing car was being made was but two miles per hour. Defendant introduced evidence, however, which tended to prove that couplings could safely be made when the cars were moving at a much higher rate of speed than were those in question at the time of the injury, and that it was customary to make couplings under those circumstances. And it was contended that the finding of the jury that the conductor was guilty of negligence in failing to apply the brakes and lessen the speed is against the evidence. The manner in which couplings are made was described to the jury by the witness. The weight of the cars was also proven. Now, the question whether the rate of speed was dangerous is in the nature of a conclusion to be drawn from the facts proven, and such others as are in the common knowledge of all men; and it was the duty of the jury to draw that conclusion. The opinions of witnesses who were qualified by their experience to express an opinion on the subject was competent evidence. The jury, however, were not absolutely bound to accept such opinions, or to be governed by them in forming their conclusion. But they might consider the facts and circumstances of the case, and if the opinions given appeared to them to be unreasonable or inconsistent with those facts, they might reject them. It can-

not be said, as matter of law, that the opinions expressed by defendant's witnesses are correct; but the question is one of fact, and we could not disturb the verdict on this ground without usurping the province of the jury, and overturning the rule which has long prevailed here,—that we will not disturb the finding of a jury on a question as to the credit which ought to be given to the testimony.

4. The judgment is for eight thousand dollars. Defendant contended that the amount is excessive. As stated above, the injury is of a serious nature, and is permanent. Plaintiff was but nineteen years old at the time of the accident, and was a strong, active young man. The injury caused him excruciating pain for a long time. He has been compelled to submit to a surgical operation, by which a portion of the ankle-bone was removed. The joints of his ankle and foot are stiffened, and he is a cripple for life. He was a laborer, and is neither qualified nor fitted for other pursuits. His ability to labor in any vocation to which his qualifications adapt him is greatly impaired. We cannot say, in view of these facts, that the amount awarded him is excessive.

The instructions given by the court are substantially the same as those given upon the first trial, and were approved on the first appeal, and they fully covered all the questions in the case. Those asked by defendant, and refused by the court, related to the same questions, and no prejudice could have resulted from the refusal to give them.

Affirmed.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE, when a question of fact for jury and when a question of law for the court: Note to *Baltimore etc. R'y Co. v. Kane*, ante, p. 387. In an action based on negligence, where the answer set up contributory negligence of plaintiff, it was error, in stating issues to the jury, to omit the issue of contributory negligence: *Gamble v. Mullin*, 74 Iowa, 99. Where in an action for negligence the fact is undisputed in the evidence that injury was received by an intervening agency, over which defendant had no control, the question of remote or proximate cause must be determined by the court, and the jury instructed accordingly: *S. S. Pass. R'y Co. v. Trich*, 117 Pa. St. 390. In an action to recover damages for an injury caused by the negligence of defendant, who pleaded contributory negligence of plaintiff, the defendant is entitled to an issue on this question: *Kirk v. Atlanta etc. R'y Co.*, 97 N. C. 82. Where plaintiff was knocked off a car through his own and his co-employee's negligence, but under the evidence it might have been found that he could have extricated himself had the brakes not been defective, and that the defect in brakes was the proximate cause of his injury, the question was for the jury, and should have been submitted to them: *Lilly v. New York etc. R. R. Co.*, 107 N. Y. 566.

RAILWAYS — MASTER AND SERVANT — LIABILITY OF MASTER FOR INJURY TO SERVANT for obeying a dangerous order of his superior: Note to *Stephens v. Hannibal etc. R. R. Co.*, ante, p. 343. Although a servant may have been injured by negligence of master, if he could with reasonable care and prudence have averted the accident, he cannot recover: *Cornwall v. Charlotte etc. R. R. Co.*, 97 N. C. 11. An order from a superior to a servant to perform a dangerous duty does not relieve servant from avoiding danger to the best of his ability in carrying out such order. To bar recovery, contributory negligence must be proximate cause of the injury complained of: *Id.*

RAILWAYS — CONTRIBUTORY NEGLIGENCE OF EMPLOYEES — ASSUMPTION OF RISKS BY EMPLOYEES. — An employee, though presumed to take the natural risk incident to the employment, does not assume that risk which arises from the negligence of the employer: *G. C. & S. F. R'y Co. v. Silliphant*, 70 Tex. 625. Every employee of a railway company assumes risks naturally incident to the employment; and company is only liable in damages, if he sustains injury when, through its negligence, it has increased the risks ordinarily incident: *Texas etc. R'y Co. v. Dillard*, 70 Tex. 62; *Fort Hill etc. v. Orm*, 84 Ky. 183. Where cars are of unequal height, and the brakeman knew such fact, yet went between the car approaching by his own signal and a stationary car, and used a straight link to make the coupling, and was injured, railway company is not liable: *Norfolk etc. R. R. Co. v. Emmert*, 83 Va. 640.

RAILWAYS — DAMAGES FOR PERSONAL INJURY — EXCESSIVE VERDICTS: See note to *Johnson v. Missouri etc. R'y Co.*, ante, p. 357.

VERDICT AND FINDINGS WILL NOT BE DISTURBED ON APPEAL WHERE THERE IS ANY EVIDENCE TO SUSTAIN THEM: *Swayne v. Waldo*, 73 Iowa, 749; 5 Am. St. Rep. 712, and note 714; *Reiley v. Haynes*, 38 Kan. 259; 5 Am. St. Rep. 737, and note 740; *Atchison etc. R. R. Co. v. Sadler*, 38 Kan. 128; 5 Am. St. Rep. 729, and note 734; but where verdict, whether based on evidence or not, is in conflict with the instructions, it should be set aside, because instructions, whether right or wrong, are the law for the jury: *Reynolds v. City of Keokuk*, 72 Iowa, 371

WEIGHT OF EVIDENCE. — IT IS THE EXCLUSIVE PROVINCE OF THE JURY TO PASS UPON THE WEIGHT of evidence, and the supreme court will not pass upon the weight of evidence: *State v. Daly*, 16 Or. 240; *Post v. Bohner*, 23 Neb. 257; *Rothschild v. Wabash etc. R. R. Co.*, 92 Mo. 91.

ENSMINGER v. ENSMINGER.

[75 IOWA, 89.]

MORTGAGES. — EVIDENCE TO ESTABLISH THAT DEED ABSOLUTE ON ITS FACE WAS INTENDED TO BE MORTGAGE, or that the real estate described therein belongs in fact to some other person than the grantee, must be clear, satisfactory, and conclusive, and not made up of loose and random statements.

ACTION in equity to determine the ownership of real estate. The facts appear in the opinion.

H. McNeil, for the appellant.

Read and Read, for the appellees.

SEEVERS, C. J. The proper title of record to the real estate in controversy is in the heirs of H. C. Ensminger, deceased. The plaintiff claims that the property in fact belongs to him, and he has introduced evidence tending to establish such fact as he claims. The settled rule is, that evidence to establish that a deed absolute on its face was intended to be a mortgage, or that the real estate described therein belongs in fact to some other person than the grantee, must be clear, satisfactory, and conclusive, and not made up of loose and random statements: *Corbit v. Smith*, 7 Iowa, 60; 71 Am. Dec. 431; *Kibby v. Harsh*, 61 Iowa, 196; *Knight v. McCord*, 63 Id. 429; *Monroe v. Graves*, 23 Id. 597; *Nelson v. Worrall*, 20 Id. 469. Having this rule in view, we have each separately read the evidence, and separately reached the conclusion that the plaintiff has failed to establish the proposition upon which his right to recover depends. We do not deem it necessary to set out the evidence, or comment upon it, deeming it sufficient to say that the evidence is conflicting, and much of it introduced by the plaintiff consists of conversations and declarations made by the deceased of a random and unsatisfactory character. Appellant has filed a motion to strike an amended abstract, because it was not filed within the time required by the rules of this court. Under the showing made by the appellant this motion must be overruled, and the judgment of the district court affirmed.

MORTGAGES. — WHAT EVIDENCE NECESSARY TO ESTABLISH THAT A DEED ABSOLUTE ON ITS FACE was intended merely as a mortgage: See note to *Turner v. McDonald*, ante, p. 192; note to *Hutzler Bros. v. Phillips*; 4 Am. St. Rep. 707, 708; *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295; *Ullman v. Jasper*, 70 Tex. 446; *Webb v. Burney*, 70 Tex. 322.

MAY v. STURDIVANT.

[75 IOWA, 116.]

VENDOR AND VENDEE. — GENERAL RULE IS, THAT PURCHASER OF REAL ESTATE IS CHARGEABLE WITH NOTICE of the equities of one in possession. But it is settled, in Iowa, that possession by a grantor, after full conveyance, is not constructive notice to subsequent purchasers of any right reserved in the land by the grantor.

VENDOR AND VENDEE — CONSTRUCTIVE NOTICE FROM CONTINUED POSSESSION BY CO-TENANT. — Where a tenant in common of land, who is in possession, purchases the interest of his co-tenant, who is not in possession, and fails to have his deed recorded, and there is no visible change in the possession of the land, though some improvements are made

thereon, and subsequently the interest of the co-tenant who had conveyed is sold on execution, the purchaser of such interest, who had no actual knowledge of the prior conveyance, and did not know that the improvements were made exclusively by the purchasing co-tenant, is not chargeable with notice of such co-tenant's rights under his deed.

EVIDENCE — HUSBAND AND WIFE. — ADMISSIONS MADE BY HUSBAND ARE NOT ADMISSIBLE as evidence against his wife, there being no pretense that when he made them he was acting for her, although he has acted generally as her agent in the management, care, and disposition of her property.

PLEADING — JUDICIAL SALE. — AVERMENT IN PETITION TO SET ASIDE EXECUTION SALE OF LAND, THAT DEFENDANT PURCHASED the property at the sale, and obtained a deed to it, with actual and constructive notice at the time of the plaintiff's rights, is equivalent to an averment that she had paid the amount of her bid, and raises no issue as to whether the purchase was for a valuable consideration.

JUDICIAL SALE. — UPON FAILURE OF PURCHASER AT SHERIFF'S SALE TO PAY AMOUNT OF BID, or to make some arrangement with reference to it, satisfactory to the judgment creditor, it is the duty of the officer to disregard the bid, and again offer the property for sale.

ACTION to quiet title to certain real estate. The facts appear in the opinion.

George D. Porter, for the appellants.

T. M. Fee, for the appellees.

REED, J. The father of the plaintiffs, in his lifetime, was the owner of the property in controversy. He died intestate in 1876, leaving a widow and eleven children surviving him. After his death, the widow and plaintiffs, who are unmarried, and a brother, who was also a single man, occupied the premises as a place of residence. In 1883, plaintiff John H. May, and the single brother spoken of above, purchased of Elizabeth Gilbert, a married sister, her interest in the estate, and received a conveyance thereof from her and her husband. In 1884, defendant J. M. Sturdivant recovered a judgment against Elizabeth Gilbert in one of the courts of Appanoose County. An execution issued on that judgment was levied on an undivided one eleventh of the property as the property of Mrs. Gilbert, and the same was sold in satisfaction of the judgment; defendant Elizabeth Sturdivant, who is the wife of J. M. Sturdivant, being the purchaser; and the sheriff subsequently executed to her a deed. Before said judgment was rendered, the single brother, who united with plaintiff John H. in the purchase of Mrs. Gilbert's interest, conveyed all his interest in the estate to the plaintiffs Mary A., Hattie E., and Melissa. At the time of the sheriff's sale, however, neither that deed

nor the one from Mrs. Gilbert was recorded. But plaintiffs were in actual possession of the premises, their possession having been continuous from the death of their father. In addition to the foregoing facts, it is alleged in the petition that defendants were charged with constructive notice of plaintiffs' rights by their possession of the premises. Also, that they had actual knowledge at the time of the sheriff's sale of the sale and conveyance by Mrs. Gilbert.

1. The general rule certainly is, that the purchaser of real estate is chargeable with notice of the equities of one in possession. There are exceptions and limitations, however, to this as to all general rules. It is settled in this state, that possession by a grantor, after full conveyance, is not constructive notice to subsequent purchasers of any right reserved in the land by the grantor: *Koon v. Tramel*, 71 Iowa, 132; *Sprague v. White*, 73 Id. 670. See also the authorities cited in the opinion in the first case. It has also been held that where one is in possession under some right which appears of record, his possession is not constructive notice of another or different right, but is referable to that right: *Rogers v. Hussey*, 36 Id. 664; *Brown v. Wade*, 42 Id. 647; *Bonnell v. Allerton*, 51 Id. 166. In *Rogers v. Hussey*, *supra*, plaintiff purchased the property, receiving a bond for a deed, and paying the greater part of the purchase price. He subsequently paid the balance, and received a deed, which was duly recorded. But in the mean time a creditor of the vendor had recovered a judgment against him, on which execution issued, and the property was sold. Plaintiff was in possession at the time of the sale, but it was held that his possession did not impart constructive notice of his ownership before the execution of his deed, and as by the record he appeared to have taken the property subject to the lien of the judgment, he was divested of the title by the execution sale. And the same doctrine was applied in the other cases. That holding appears to be conclusive of the question which arises on the facts of this case. Before the purchase of Mrs. Gilbert's interest, plaintiffs were tenants in common with her in the whole estate. As such they were entitled to enter and use the whole of the property: *Freeman on Cotenancy*, secs. 248, 249; *Commonwealth v. Lakeman*, 4 Cush. 597; *Carpentier v. Webster*, 27 Cal. 544. At the time of the purchase they were in possession under that right. There was no change of possession after that, for Mrs. Gilbert had never occupied or used the premises. Some improvements

were made on the premises after the purchase of Mrs. Gilbert's interest, it is true, but there is no evidence that either of the defendants knew that these improvements were made exclusively by plaintiffs. Possession was originally taken by plaintiffs under a right which was matter of record, and it cannot, under the rule as settled by the cases cited, be held to have constituted constructive notice of the new or additional right acquired by them under the deed from Mrs. Gilbert.

2. Elizabeth Sturdivant is the owner in her own right of considerable property, and her husband has acted generally as her agent in the management, care, and disposition of her property. The only evidence which tends to show actual knowledge by either of the defendants, before the execution sale, of the purchase by plaintiffs of Mrs. Gilbert's interest, is that which tends to establish certain admissions by the husband to the effect that he knew of the existence of the deed from her to them. On the trial, however, he testified positively that he did not have such knowledge. He also denied that he ever made the admissions attributed to him. If it should be admitted that their relations were such that his knowledge would be imparted to her,—a matter of serious doubt, however, as he did not act for her in the purchase of this property,—still the evidence by which that knowledge is sought to be proven is, as against her, entirely incompetent; for there is no pretense that when he made the alleged admissions he was acting for her.

3. When Mrs. Sturdivant bid in the property at the sheriff's sale she did not pay over to the sheriff the amount of her bid. She testified, however, that her husband had money belonging to her in his hands at the time sufficient to satisfy his judgment, and that she had given him credit for the amount of his bid on the amount he was owing her. It was contended in argument that she is not a purchaser for value. We deem it sufficient to say on this subject that no such question was made in the pleadings. The petition alleges simply that she purchased the property at the sheriff's sale, and had obtained a deed to it, and that she had actual and constructive notice at the time of the rights of plaintiff. These averments do not raise an issue of that character. They inform the defendant simply that plaintiffs were relying on the facts of such notice to defeat her title. Indeed, the averment that she purchased the property, and had obtained a deed, is equivalent to an averment that she had paid the amount of her bid;

for upon a failure of a purchaser at a sheriff's sale to pay the amount of the bid, or make some arrangements with reference to it satisfactory to the judgment creditor, it is the duty of the officer to disregard the bid, and again offer the property. We think the judgment of the district court cannot be sustained.

Reversed.

VENDOR AND VENDEE—POSSESSION OF LAND BY GRANTOR CONSTRUCTIVE NOTICE OF TITLE: *Hafter v. Strange*, 65 Miss. 323; 7 Am. St. Rep. 659, and note 662; *Smith v. Yule*, 31 Cal. 180; 89 Am. Dec. 167; *Wyatt v. Elam*, 23 Ga. 201; 68 Am. Dec. 518; *Blankenship v. Douglas*, 26 Tex. 225; 82 Am. Dec. 608; *Moore v. Pierson*, 6 Iowa, 279; 71 Am. Dec. 409; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 594; *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 840; *Buck v. Holt*, 74 Iowa, 295; *Gill v. Hardin*, 48 Ark. 409.

PURCHASER FROM ONE NOT IN POSSESSION IS CHARGEABLE WITH WHAT NOTICE: *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295, and note 300.

HUSBAND AND WIFE—COMPETENCY OF HUSBAND OR WIFE as witness against the other: *Chamberlain v. People*, 23 N. Y. 85; 80 Am. Dec. 255, and note; *Spitz's Appeal*, 56 Conn. 184; 7 Am. St. Rep. 303. A statute removing disability of witnesses on ground of interest does not render husband and wife competent witnesses against each other: *Gee v. Scott*, 48 Tex. 510; 26 Am. Rep. 331.

JUDICIAL SALES.—IF A PURCHASER AT A JUDICIAL SALE FAILS TO COMPLY with his bid, the court may either decree, — 1. That he specifically perform his contract; 2. That the land be resold, and purchaser released; or, 3. That land be resold without releasing purchaser; but in the latter case, the purchaser must undertake, as a condition precedent to the order of subsequent sale, to pay all additional costs, and to make good any deficiency in price: *Hudson v. Coble*, 97 N. C. 260.

SCHNEITMAN v. NOBLE.

[75 IOWA, 120.]

ATTACHMENT.—VALIDITY OF JUDGMENT AGAINST DEFENDANT IN ATTACHMENT SUIT CANNOT BE ASSAILED by a garnishee of the defendant in a collateral proceeding upon the ground that notice of the action was not duly served upon such defendant, if there was a service in fact, though imperfect, but which the trial court determined to be sufficient to give jurisdiction.

GARNISHMENT—ESTOPPEL BY PLEADING.—GARNISHEE IN ATTACHMENT SUIT IS ESTOPPED FROM CLAIMING proceeds of certain notes on the ground that the notes had been turned over to him by the attachment defendant in satisfaction of a debt, by the fact that, after he received the notes, he brought an action against such defendant to recover the same debt, alleging that it had not been paid, whereupon a judgment was rendered in his favor. And this is so, although he commenced the action on the advice of counsel to perfect his title to the notes, not intending to release any right which he had to them.

BANKS AND BANKING. — IN ABSENCE OF SPECIAL AUTHORITY, CASHIER OF BANK CANNOT TRANSFER notes of the bank in payment of a deposit so as to bind the bank. And the depositor receiving the notes will be regarded as holding them, or their proceeds, in trust for the bank, subject to garnishment by its creditors.

APPEAL — COSTS. — UNDER RULES OF IOWA SUPREME COURT, APPELLANT WILL BE TAXED WITH COST of printing the appellee's additional abstract; but the cost of preparing an additional abstract by the appellee will not be so taxed unless there is reason to believe that the appellant has intentionally omitted material matter from his abstract which his duty required him to submit to the court.

ACTION against the defendants Danford and Gundrum to recover \$396.50, alleged to be due from them to the plaintiff Schneitman. A writ of attachment was issued on the same day in aid of the action, and was served by garnishing the appellant Noble on the day following. The plaintiff had a judgment in his favor, and against Danford, for \$296.70 and costs. Issue was joined on the garnishee's answer, denying all liability to Danford, and tried to the court. Judgment was rendered against the garnishee for \$240, and he appealed from the judgment.

Willard, Fletcher, and Willard, for the appellant.

C. A. and J. G. Berry, and Charles S. Fogg, for the appellee.

ROBINSON, J. 1. Appellant claims that the judgment against Danford is void for the alleged reason that he was not served with notice of the action. It appears that Danford was engaged in the banking business at Casey, in Guthrie County, from some time in June until about the eleventh day of August, 1885, and that his co-defendant was his cashier, and at the time in question was intrusted with the management of the business. The return on the original notice is as follows: —

"The within notice came into my hands on the twenty-sixth day of August, 1885, and on the twenty-seventh day of August, 1885, I served the same on the within-named defendant, J. S. Danford, by serving E. B. Gundrum, cashier and agent of J. S. Danford, by offering to read the within notice to him, he waiving the reading, and delivering to him a true copy thereof. All done within Guthrie County.

"F. C. GALBRAITH,

"Sheriff of Guthrie County, Iowa."

Section 2613 of the code is as follows: "When a corporation, company, or individual has, for the transaction of any

business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency in all actions growing out of or connected with the business of that office or agency." It does not appear that Danford had a residence in Guthrie County, and it is shown that his indebtedness to plaintiff grew out of the business in which Gundrum was employed. The judgment recites that Danford had been duly served with notice of the suit. The evidence tends to show that he was not doing business in Guthrie County when the original notice was served, and that Gundrum was then engaged in other business. It is shown that Danford was duly served with notice of the garnishment proceedings, although he does not appear therein, nor did he appear in the original action. The rule to which this court has always adhered is, that if a service of the original notice—which service is in part imperfect—is shown to have been made, and it appears that the trial court has determined that it is sufficient, its sufficiency cannot be attacked in a collateral proceeding: *Shawhan v. Loffer*, 24 Iowa, 226; *Myers v. Davis*, 47 Id. 328; *Shea v. Quintin*, 30 Id. 58. In this case, the attachment was regular; there was a service of the original notice, which the district court adjudged to be sufficient to give it jurisdiction of Danforth, and a judgment was rendered against the real debtor, of which he does not seem to complain. Whether Gundrum was the agent or clerk of Danford, within the meaning of section 2613, on the date when the notice was served, or whether the return was defective so that the judgment would have to be set aside upon a proper application of Danford, we need not determine. We are satisfied that appellant cannot question the validity of the judgment in this proceeding.

2. The place of business of Danford was closed by the sheriff on the eleventh day of August, 1885. On the morning of that day, and just before the time for commencing business, appellant obtained from the cashier of the bank a small sum of money and a quantity of notes, which he alleges were received to apply in payment of a claim he then held against the bank, and which amounted to something less than three hundred dollars. The amount of the notes so received is not definitely shown, but is claimed by appellant to have been less than the amount which the bank owed him. It is claimed by appellee that these notes were wrongfully obtained, and that appellant is liable for the amount he has realized from them, since all

have been collected. In the absence of a more general authority, the cashier would be restricted in his power to bind his principal to the doing of such acts as are usually performed by persons who occupy the position he held. In other words, in the absence of proof of special authority, Gundrum must be held to have had power to bind his employer only by acts done in the usual and ordinary course of business. Appellant was a depositor, and the notes were turned over in payment of the deposit. We do not think that bank depositors are usually paid in that manner; and there is no showing that it was the ordinary method adopted by Danford. But appellant claims that the payment in notes was, in this instance, authorized by telegrams sent to the cashier by Danford, and by subsequent ratification. All we need to say as to these claims is, that the telegrams were of doubtful authenticity, and the alleged ratification very unsatisfactory. We should not feel disposed to disturb the judgment of the district court on these grounds.

3. In January, 1886, the appellant commenced an action against Danford to recover the amount of the deposit in payment of which he is now insisting that the notes in controversy were delivered to him. A writ of attachment was issued in that action, and appellant delivered to the sheriff, who held the writ, \$240, as the property of Danford. Judgment was rendered in that action in favor of appellant, on the sixteenth day of March, 1886, for \$291.60, and costs. The proceedings in these actions are pleaded by plaintiff in this as an estoppel. The appellant, to avoid the effect of this plea, contends that his action against Danford was commenced on the advice of an attorney, for the purpose of perfecting his title to the notes which he received from the cashier, and not with the purpose of releasing any right which he had to the notes. But appellant alleged in his petition in that case, "that on the eleventh day of August, when said Bank of Casey suspended business, this plaintiff had on deposit in said bank the sum of \$291.60; that the said bank has never legally paid any part of said \$291.60." The validity of the proceedings and judgment in that action are not questioned. Appellant, having elected to treat his deposit as unpaid, for the purpose of obtaining judgment against Danford, should not be heard in this proceeding to question the effect of such election: *Citizens' Bank v. Dows*, 68 Iowa, 460, and cases therein cited.

4. The appellee filed an additional abstract, and with it a motion to tax the cost of the printing and preparation of the additional abstract to appellant. The costs of printing will be so taxed, under the rules of this court. It is the duty of appellant in all cases to submit to this court a fair abstract of so much of the record as is necessary to an understanding of the questions involved in the appeal, and he should not be permitted to cast the burden of preparing the record on the appellee, by filing an abstract so imperfect as to be an abstract in name only. It is desirable, however, in most cases, to have the record contained in the abstract abridged as much as a fair presentation of the material facts of the controversy involved in the appeal will permit. If the appellant in good faith attempts to prepare an abstract of this kind, he should not be punished for an accidental omission, nor for an honest mistake as to what is material. We are not satisfied that there was such an intentional omission of material matter from the abstract of appellant as would justify the imposition of any special penalty. The motion as to cost of preparing the additional abstract is therefore overruled. The judgment of the district court is affirmed.

ATTACHMENT. — ORDER MADE BY COURT AGAINST GARNISHEE AFTER JUDGMENT CANNOT BE COLLATERALLY ATTACKED; but if proper proceedings are had before the payment of money to creditor to show that the money was exempt, the court should withhold the money, and refuse to apply it in satisfaction of the debt: *Union Pac. R'y Co. v. Smerah*, 22 Neb. 751; 3 Am. St. Rep. 290. Garnishee cannot assail collaterally a judgment against his creditor for mere irregularities, or because it is voidable: *Gunn v. Howell*, 35 Ala. 144; 73 Am. Dec. 484; *Pierce v. Carleton*, 12 Ill. 358; 54 Am. Dec. 405.

JUDGMENTS, WHEN MAY AND MAY NOT BE COLLATERALLY ATTACKED: *Mitchell v. Aten*, 37 Kan. 33; 1 Am. St. Rep. 231, and note 234; *Indiana etc. R'y Co. v. Allen*, 113 Ind. 308; 3 Am. St. Rep. 650, and note 654; *Knott v. Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547, and note 551; *Cook v. Moore*, 100 N. C. 294; 6 Am. St. Rep. 587.

BANKS AND BANKING. — WHERE B WAS CASHIER OF A NATIONAL BANK, and treasurer of a savings bank, and took bonds of the savings bank, and as cashier and manager of the national bank pledged them as security for advance of money to the national bank, and they were afterwards sold by the pledgees, and the proceeds credited to the national bank, the national bank was liable to the savings bank for the bonds, even though the directors of the national bank were ignorant of the transaction: *Fishkill Sav. Ins. v. National Bank*, 80 N. Y. 162; 36 Am. Rep. 595.

HENDERSON v. McMAHILL.

[75 IOWA, 217.]

GARNISHMENT — ESTOPPEL OF GARNISHEE TO DENY INDEBTEDNESS. — Although the plaintiff in an attachment suit was induced by the garnishee therein to begin the action and to garnish him, solely on the faith of representations made by the latter that he was indebted to the defendant in the action, and that he held funds of the defendant liable to garnishment, thus leading the plaintiff to incur expense and trouble, yet the garnishee is not thereby estopped from denying his indebtedness to the defendant, and he is at most only liable to the plaintiff for the actual expenses incurred by him in reliance upon the representations.

W. P. Ferguson and Benjamin Todd, for the appellants.

C. S. Keenan, for the appellee.

SEEVERS, C. J. The plaintiff commenced this action against the defendant, and caused the defendant Prestman to be attached as garnishee. The latter appeared, and denied being indebted to defendant. The plaintiff controverted the answer of the garnishee, and pleaded that he was estopped from denying that he was indebted to defendant, on the ground that plaintiff commenced this action on the faith of the representations made by the garnishee. There was a demurrer to such pleading, which was sustained, and as the amount in controversy was less than one hundred dollars, we are required to determine the following questions certified by the trial judge: "A party, for the sole purpose of inducing the plaintiff to sue out an attachment against the defendant and have himself garnished as debtor of defendant, represented to plaintiff that he held funds of defendant liable to garnishment, which plaintiff might secure by such process. The plaintiff, relying solely on such representations, made at and prior to the service of the garnishment, commences and prosecutes suit by attachment against defendant, which is served by garnishment of garnishee, thereby incurring expense and trouble, which will be lost if garnishee is permitted to deny the truth of such representations. The question is, Do such facts estop the garnishee from afterwards denying indebtedness or liability to defendant? If yes, this cause should be reversed. If no, then affirmed." The plaintiff's debt against defendant still exists. It is true, he incurred costs, and was put to trouble, but we are not asked whether he can recover such costs, but whether the garnishee can deny the indebtedness. We think he can, if such is the truth. He is at most only liable to the extent

the plaintiff has suffered loss in reliance on the representations, and this is the extent of the estoppel: *Lewis v. Prenatt*, 24 Ind. 98; 87 Am. Dec. 321. The question propounded must be answered in the negative, and the judgment of the district court affirmed.

GARNISHMENT — ESTOPPEL. — GARNISHEE IS NOT ESTOPPED FROM DENYING INDEBTEDNESS TO DEFENDANT at the time attachment is issued, by reason of the fact that before the suing out of the writ, he, the garnishee, had admitted to plaintiff that he was indebted to the attachment defendant: *Phil-epsburg Bank v. Fulmer*, 31 N. J. L. 52; 86 Am. Dec. 193; and that if garnished, he would pay the money to plaintiff: *Lewis v. Prenatt*, 24 Ind. 98; 87 Am. Dec. 321, and note 323.

BARNES v. McCREA.

[75 IOWA, 267.]

SALE — DELIVERY OF GRAIN TO ELEVATOR. — TRANSACTION IS SALE, and not a bailment, where grain is delivered to an elevator-owner under an alleged oral agreement that the latter was to have the grain on paying the highest market price, or in case he did not buy, to receive pay for weighing, but not for storage, it being known to the party who delivered the grain that it was indiscriminately mixed in a mass with other grain, from which the elevator-owner was accustomed to ship when prices suited him. And the latter having subsequently mortgaged all the grain then in the elevator, but not including any of the identical grain in question, the party who delivered it could not, as against the mortgagees, set up any claim to the mortgaged grain.

THE plaintiffs delivered a quantity of oats to the elevator of one Huntley, who afterwards failed, and the defendants took possession of all the oats then in his elevator, under a chattel mortgage executed by Huntley. The plaintiffs alleged that at the time of the failure they were the owners of the oats, and that the defendants converted them to their own use. After the evidence was in, the defendants moved the court to instruct the jury to return a verdict for them, and the motion was sustained. The plaintiffs appealed.

Clayton Harrington and E. L. Green, for the appellants.

Crooks and Jordan, for the appellees.

ROBINSON, J. The motion to instruct the jury for the defendants was based upon the grounds that the agreement between plaintiffs and Huntley, under which the oats were delivered in the elevator, was in legal effect a sale, and not a

bailment, and that none of the oats so delivered by plaintiffs were among those taken by defendants. The evidence shows that at the time in question Huntley was engaged in the business of buying, shipping, and selling grain for himself, and in storing grain in his elevator for others. This elevator contained fifteen bins, in which grain he purchased and grain stored was placed indiscriminately, and mixed. When plaintiffs delivered their oats, a large amount was being received by Huntley, and all were mixed together in various bins, without regard to ownership, and plaintiffs knew that fact. They also knew that Huntley was shipping to Chicago, and selling when he could obtain satisfactory prices, and that such had been his custom for years. The only oats taken by defendants were the contents of a bin which was filled in the fall of 1886, and had not been disturbed, and a few hundred bushels purchased by Huntley after the third day of March, 1887, and a few days before the failure. None of the oats actually delivered by plaintiffs, and none of the oats with which theirs had been mixed, were taken by defendants. No warehouse receipt was taken by plaintiffs, and no writing was delivered to them, excepting a memorandum of the number of bushels and pounds of oats hauled and the dates of delivery. The appellants claim that their oats were delivered under a verbal agreement that they were to stay in the elevator until plaintiffs were ready to sell them. Huntley was then to have them, if he would pay as much as was paid by other parties in Ogden or Berkley, and in case he did not buy, he was to receive one cent per bushel for weighing the oats in and out.

The statements of plaintiffs in regard to the contract must be taken and construed in connection with admitted and known facts. When so considered, it is evident that plaintiffs could not have understood that the identical grain which they delivered was to be retained in the elevator, and returned to them if not purchased by Huntley. They knew that to be impossible, because they saw it mixed with other grain, from day to day, as it was delivered. They could not have understood that the mass with which their oats were mixed was to be retained in the elevator until they should sell or receive therefrom the number of bushels they delivered, for the reason that they knew that Huntley shipped and sold from this mass from time to time, as the prices suited him. The only conclusion which can properly be drawn from the evidence is,

that the oats were delivered to Huntley under an agreement by which he could elect to return to plaintiffs an equal quantity of oats, when they desired to close the transaction, or in lieu thereof to pay to them the highest market price for the same in Ogden or Berkley. The right to make the election was vested in Huntley alone. Plaintiffs could not withdraw any oats unless Huntley refused to pay for them the highest market price in the places named. These facts bring the case within the rule announced in *Johnston v. Browne*, 37 Iowa, 200. But it is said that the decision in that case is in conflict with the later one in *Sexton v. Graham*, 53 Id. 181. In the last-named case it was said "that where a warehouseman merely receives grain from several depositors, with the understanding that it may be mixed in a common mass, and it is so mixed, the transaction is a bailment, and the depositors are tenants in common." And that doctrine seems to be sustained by the authorities. The majority opinion goes further, and holds, in effect, that the common mass from which each owner is entitled to draw need not contain any of the grain which constituted the original mass. This seems to have been based, in part at least, upon the thought that the warehouse receipt attaches to each new deposit, and that the receipt-holder becomes and remains at all times a tenant in common of the mass which is being increased or diminished. The opinion was the result of the conclusion of the majority that the original transaction between Sexton and Abbott and Graham was one of bailment, and that while the entire contents of the warehouse were changed several times, yet that the amount of grain in store at any given time was neither greater nor less by reason of the change; and further, that by reason of the plan of handling the grain, all which the warehouse contained at any time was to be considered the common mass, from which each depositor was entitled to draw. In other words, the majority opinion rests upon the conclusion of those who concurred in it, that the grain in question was deposited under a contract of bailment, and that nothing afterwards transpired to change the contract, nor to change the relation of the depositors to the contents of the warehouse. If the conclusions are correct, the decision was justified. But in our opinion, the contract in this case was not one of bailment, but of sale. This necessarily results from the fact that plaintiffs delivered the grain with knowledge that it was being mixed with other grain which was being shipped by Huntley, and from

the further fact that Huntley had the right to retain the grain on paying for it the highest market price in the two places designated. The facts show that the contract must have been made with reference to Huntley's known course of dealing: *Hughes v. Stanley*, 45 Iowa, 625. In case grain was returned to plaintiffs, they were to pay Huntley for weighing in and out, but nothing for storage. It was said in *Norton v. Woodruff*, 2 N. Y. 156, that "the distinction between an obligation to restore the specific thing received, or of returning others of equal value, is the distinction between a bailment and a debt, so recognized by the decisions in England and this state, with the exception of *Seymour v. Brown*, 19 Johns. 44," and that "the decision in *Seymour v. Brown* has been overruled in the same court in which it was pronounced, and cannot, we think, be sustained upon principle or authority." The case of *Norton v. Woodruff*, *supra*, was approved in *Johnston v. Browne*, *supra*. The principle therein announced is sustained by numerous decisions: *Wilson v. Cooper*, 10 Iowa, 566; *Seymour v. Wyckoff*, 10 N. Y. 216; 2 Kent's Com. 589; *Chase v. Washburn*, 1 Ohio St. 244; 59 Am. Dec. 623; *Hurd v. West*, 7 Cow. 752; *Ewing v. French*, 1 Blackf. 354; *Loneragan v. Stewart*, 55 Ill. 45; *Butterfield v. Lathrop*, 71 Pa. St. 226; *Rahilly v. Wilson*, 3 Dill. 420. We are satisfied with the doctrine of *Johnston v. Browne*, *supra*, and think it controls in this case. The judgment of the district court is therefore affirmed.

SALES. — TITLE TO PERSONALTY MAY PASS TO VENDEE WITHOUT AN ABSOLUTE PRICE being fixed, if the circumstances attending the transaction show such to be the intention of the parties: *Greene v. Lewis*, 85 Ala. 221; 7 Am. St. Rep. 42, and note 43; compare note to *Farmers' Phosphate Co. v. Gill*, *ante*, p. 449.

SALES — BAILMENTS — FUNDAMENTAL DISTINCTION BETWEEN A SALE AND A BAILMENT DISCUSSED: *Bretz v. Diehl*, 117 Pa. St. 589; 2 Am. St. Rep. 706, and note 711-713; *Carlisle v. Wallace*, 12 Ind. 252; 74 Am. Dec. 207.

SALES. — SALE OF GOODS DELIVERED IN WAREHOUSE, WHAT CONSTITUTES SUFFICIENT DELIVERY: *Allen v. Agee*, 15 Or. 551; 3 Am. St. Rep. 206, and note 210.

REIZENSTEIN v. MARQUARDT.

[75 IOWA, 294.]

STATUTE OF LIMITATIONS.—GENERAL RULE AS TO ACTIONS ARISING UPON CONTRACTS, EXPRESS OR IMPLIED, IS, that where the right of action depends upon a demand, such demand must be made within the period prescribed by the statute of limitations. A party cannot prevent the running of the statute by omitting to do some act which he might have done, or which he is required by law to do.

STATUTE OF LIMITATIONS WILL NOT BEGIN TO RUN IN FAVOR OF BAILEE UNTIL he denies the bailment, and converts the property to his own use.

ACTION to recover the value of a gold watch alleged by the plaintiff to have been converted by the defendant to his own use. The facts appear in the opinion.

Ranck and Wade, for the appellant.

Robinson and Patterson, for the appellee.

ROTHROCK, J. As the cause was determined upon a demurrer, it is necessary to set out the material facts as they appear in the petition, and the amendments thereto. They are in substance as follows: By the original petition and the first amendment it was averred that in the year 1877 the plaintiff delivered the watch in question to the defendant for repair and safe-keeping; and that he demanded the same of the defendant about March, 1887; and that defendant gave an evasive answer to the demand; and that a formal demand was afterwards made, and defendant failed and refused to deliver the watch. By the second amendment it was averred that said watch was delivered to the defendant for repairs; that after the repairs were made, and in the same year, at the suggestion of the defendant, the watch was left in his possession for safe-keeping; that the parties afterwards had a number of conversations about the watch, in which defendant proposed to purchase the same, but plaintiff refused to sell; that these conversations occurred about every year, or oftener; that no demand was made until about 1887, and that the defendant at no time refused to deliver the watch to plaintiff until that time; that when the demand was made defendant delivered to plaintiff a lady's watch, which was deposited with defendant by plaintiff at the same time, and under the same contract as the watch for the conversion of which this action was brought; that, at the time the watch in question was delivered to the defendant, the parties were intimate friends and neighbors, and that the plaintiff allowed the watch

to remain in the possession of defendant because of said intimate friendship, and by reason of the confidence placed in him as a friend and neighbor. The demurrer to the petition was on the ground of the statute of limitations. The action was commenced on the twenty-fifth day of October, 1887, and actions of this kind are barred in five years from the time the cause of action accrues: Code, sec. 2529, subd. 4.

It is claimed in behalf of the appellee that the statute commenced to run at the time the deposit was made, and that a demand of the watch not having been made within five years from the deposit, the action is barred. In other words, the claim is, that no action can be maintained, because demand was not made within five years after the inception of the relation of bailor and bailee between the parties. It is a general rule that a party cannot prevent the running of the statute of limitations by omitting to do some act which he might have done, or which he is required by law to do. A party having a claim for money against a county cannot extend the time for commencing the action by failing to present his claim to the board of supervisors: *Baker v. Johnson County*, 33 Iowa, 155. The same rule applies to promissory notes payable on demand. And generally, where a right of action depends upon a demand, such demand must be made within the period prescribed by the statute of limitations: *Ball v. Keokuk & N. W. R'y Co.*, 62 Id. 753. This is the rule as to actions arising upon contracts, express or implied: See *Thrall v. Mead's Estate*, 40 Vt. 540; *Codman v. Rogers*, 10 Pick. 112; *Palmer v. Palmer*, 36 Mich. 488; 24 Am. Rep. 605; *Jameson v. Jameson*, 72 Mo. 640. In *Codman v. Rogers*, *supra*, it is held that the statute will not begin to run until demand, yet, unless demand be made in a reasonable time, the plaintiff will not be entitled to relief; and a reasonable period of time is determined by the circumstances; and where no cause for delay is shown, the time is to be fixed by the statute of limitations. But the action in this case is in the nature of an action for a tort. It is not grounded upon an agreement to pay money for the watch on demand for the money. The defendant was engaged in the business of a jeweler and repairer of watches. It is alleged in the petition that the watch is very valuable, and worth some \$325, and that after it was repaired it was left with defendant for safe-keeping. It was not contemplated by the parties that a demand would be made immediately. If such had been the intention, it would not have

been deposited for safe-keeping. No right of action accrued until there was a wrongful conversion of the property. The rights and obligations of a bailee of personal property are very much like those of a trustee of a resulting trust in realty, and it has always been held that the statute of limitations commences to run in favor of a trustee from the time when he denies the trust, and claims the trust property as his own: *Peters v. Jones*, 35 Iowa, 512; *Gebhart v. Sattler*, 40 Id. 152. Upon the same principle, the statute of limitations will not begin to run in favor of a bailee until he denies the bailment, and converts the property to his own use. And the refusal to deliver the property on demand is a conversion. In our opinion, the demurrer to the petition should have been overruled.

Reversed.

STATUTE OF LIMITATIONS. — Statute will not bar an action for conversion, in absence of knowledge by the owner of such conversion, until a reasonable time elapses for learning the facts: *Houston etc. R'y Co. v. Adams*, 49 Tex. 748; 30 Am. Rep. 116.

STATUTE OF LIMITATIONS. — **THE CAUSE OF ACTION ON A JOINT CONTRACT, NOT OF A PARTNERSHIP, NOR OF A NEGOTIABLE INSTRUMENT, and dependent on demand, accrues on demand on one of the contractors:** *Rhind v. Hyndman*, 54 Md. 527; 39 Am. Rep. 402. Where action was brought December 24, 1874, on a promissory note dated December 24, 1867, payable one year after date, and it did not appear that there was a demand and refusal of payment on the day the note fell due, the statute of six years' limitation had not run, and the action was well brought: *Beeman v. Cook*, 48 Vt. 201; 21 Am. Rep. 123. Demand and notice, when conditions precedent to bringing of action, must be made within a reasonable time, and certainly not after the period within which an action on the obligation can be maintained: *Pittsburg R. R. Co. v. Byers*, 32 Pa. St. 22; 72 Am. Dec. 770.

BALDWIN v. ST. LOUIS, KEOKUK, AND NORTHWESTERN RAILWAY COMPANY.

[75 IOWA, 297.]

PRACTICE — CONSTRUCTION OF RULE OF COURT. — **APPELLATE COURT WILL NOT DISTURB LOWER COURT'S CONSTRUCTION** of its own rules, although it were doubtful, and admitting of an honest difference of opinion. Such construction will be presumed to be in harmony with the intention with which the rule was adopted, and will be regarded as part of the rule itself, which the higher court will feel bound to follow.

MASTER AND SERVANT. — **PERSON HAVING FULL CONTROL OF TIMBER-YARD OF RAILROAD COMPANY, and who employs and discharges men, is to be regarded as a vice-principal; and one who takes his place in his absence**

is a temporary vice-principal; and the negligence of either, resulting in personal injury to a subordinate employee, is not the negligence of a fellow-servant, and the company is liable.

MASTER AND SERVANT — NOTICE TO VICE-PRINCIPAL. — Notice to temporary vice-principal in charge of timber-yard of railroad company of a defect in the piling of the timber, resulting in the injury complained of, is notice to the company, irrespective of the question whether he had or had not piled the timber, or had any duty to perform in connection therewith.

PRACTICE. — WITNESSES MAY BE SO INTERROGATED AS TO TEST THEIR TRUTHFULNESS; but this should be done in such manner that unseemly scenes between them and counsel may be avoided; and it is the duty of the court to exercise such restraining authority over counsel as will attain that end.

PRACTICE. — COURSE OF EXAMINATION OF WITNESS STOPPED BY COURT. — Where a witness was asked on cross-examination, in language hardly proper, whether his testimony was not false, which question he resented, and was then asked another question of like import, to which an objection was sustained, the court properly stopped the course of the examination.

ACTION for damages for personal injuries sustained by the plaintiff while in the employ of the defendant, caused by its negligence. Judgment on a verdict for the plaintiff, and the defendant appealed.

J. H. Anderson and H. H. Trimble, for the appellant.

Gibson Brown and D. F. Miller, Jr., for the appellee.

BECK, J. 1. This is the fourth appeal to this court in this case: See 63 Iowa, 210; 68 Id. 37; 72 Id. 45. The pleadings and evidence found in the abstract before us upon this appeal are substantially the same as those in the former appeals, and are stated in the opinions announcing our former decisions, so far as was deemed necessary. In one or two instances, it is claimed that the evidence upon the last trial is, to some extent, different from the evidence on the former trials. If it be found in the consideration of the case in this opinion that these differences are important, they will receive proper notice. Our former opinions, in connection with this opinion, present all the pleadings and evidence necessary for an understanding of the points of our present decision. We shall proceed to the consideration of the questions raised by defendant's counsel in the order of their discussion by them.

2. A rule prevailing in the district court is in the following language: "Rule 2. In any case once continued, where an answer is on file, either party desiring to bring such cause on for trial at any term shall, at least ten days before such term,

file with the clerk a notice of trial, and no such cause shall stand for trial unless a trial notice be so filed, except by consent of parties; provided, that after the commencement of the term, the court may, in its discretion, by order entered of record, permit notices of trial to be entered in the same manner ten days prior to such date as the court may name in such order. Such order may be general, and not entered of record in each particular case." The case had once been continued, and no notice under this rule had been given before the term. But after the commencement of the term, a notice in accord with the rule was given in pursuance of an order entered of record in this case, as contemplated by the rule. But the order was special, applying in this and no other case. To the entering of this order defendant excepted, and now insists that it is erroneous. The ground of defendant's objection, as we understand it, is, that the rule contemplates that the order shall be general, and should not be made applicable to one case. The district court, we think, rightly construed the rule to authorize the special order applicable to this case alone. We think the language of the rule plainly authorizes this conclusion. But were it doubtful, admitting an honest difference of opinion, we would not disturb the construction of the district court of its own rules. We would presume that such construction is in harmony with the intention with which the rule was adopted, and we would regard the construction as a part of the rule itself, settling the practice upon this point through the whole district. We therefore feel bound to follow the interpretation of the rule adopted by the district court, and affirm its ruling complained of by counsel.

3. Counsel for defendant insist that the evidence fails to support the verdict, and that the court below, therefore, erred in refusing to direct a verdict for defendant. This objection is based upon the claim that plaintiff, not being engaged in the operation of the railroad, cannot recover for the negligence of a co-employee, and that the negligence, if any were shown, was of a co-employee. We think the evidence tends to show negligence on the part of the person having charge of the piling of the timber, and its care, which caused the injury. This person had full control of the timber-yard, employed and discharged men, and is to be regarded as a vice-principal. He was sometimes absent from the yard and the care and management of the business, and matters were committed to or devolved on

another, who took his place, and exercised the authority with which he was charged. This other person is therefore to be regarded as a temporary vice-principal in the place of his superior. The evidence tends to show negligence on the part of those persons who were in charge of the timber, and directed the manner of piling it. Certain it is that it cannot be claimed that there is such an utter absence of evidence as requires us to hold that the verdict of the jury was the result of passion or prejudice.

4. Evidence was admitted, against defendant's objection, showing that Coller, the employee who acted for the vice-principal having charge of the yard, and who seemed to be a kind of an assistant of the vice-principal, was informed of the defects in the piling of the timber by having his attention directed to it by a witness. It is insisted that it was not shown that Coller had charge of the business, so that the notice to him would operate as notice to defendant. But the evidence is amply sufficient to warrant the conclusion (indeed, it is hardly contradicted) that Coller did have charge of the yard when plaintiff was injured, and was therefore the agent of defendant; and notice to such agent would bind the defendant.

5. Counsel urge that the court erroneously refused instructions asked by defendant, to the effect that before the jury could consider the notice to Coller, they should find that he had some duty to perform in piling the timbers, or in connection with the piles. Coller was in charge of the yard as an agent, and was bound to report to his principal whatever affected the property or defendant's interest in connection therewith. This duty did not rest upon the fact that he had piled the lumber, or had authority to take down the piles and rebuild them. Surely, if for any reason a pile of timbers would appear to be in a condition which would warrant the conclusion that it would fall, resulting in injury to defendant's property, Coller's duty required him to report the fact, whether he had or had not built the piles, or had or had not authority to do any labor or make any outlay to prevent them from falling.

6. A witness for plaintiff was asked by the defendant whether certain statements made by him in his testimony were not without foundation in fact. An objection to the question was sustained. A preceding question to the witness, in language hardly proper, asked him to state if his testimony was not false. This the witness resented. We think the

court rightly stopped the course of the examination. Witnesses may be so interrogated as to test their truthfulness; but this should be done in such manner that unseemly scenes between them and counsel may be avoided; and it is the duty of the court to exercise such restraining authority over counsel as will attain that end. We think the district court, in this instance, rightly arrested the course of examination pursued by counsel.

7. The rulings of the district court upon the instructions given and refused, we think, are correct, and demand no separate consideration. Many of the instructions to the jury, we discover, were given upon the former trials, and some of them have been expressly approved by the court in the prior appeals in this case. They present proper rules applicable to the questions of negligence, liability of defendant therefor, etc.; which are raised by the issues in the case. In our opinion, the judgment of the district court ought to be affirmed.

MASTER AND SERVANT. — LIABILITY OF MASTER FOR ACTS AND NEGLIGENCE OF A FOREMAN OF A CREW OF WORKMEN, or one whom he has placed in full charge of any particular branch of work: See note to *Stephens v. Hannibal etc. R'y Co.*, ante, p. 343; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 362; 44 Am. Rep. 573; *Mitchell v. Robinson*, 80 Ind. 281; 41 Am. Rep. 812; *Cowles v. Richmond etc. R. R. Co.*, 84 N. C. 309; 37 Am. Rep. 620; *Tyson v. North and South Alabama R. R. Co.*, 61 Ala. 554; 32 Am. Rep. 8; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298. Where master would be liable for negligence of one servant, he is also liable for the negligence of another co-servant acting temporarily for such servant in his place and stead: *Berea Stone Co. v. Kraft*, 81 Ohio St. 287; 27 Am. Rep. 510.

WITNESSES. — DISPARAGING QUESTIONS NOT RELEVANT TO THE ISSUE, AND PUT FOR THE EXPRESS PURPOSE OF DISCREDITING WITNESS, or otherwise degrading him, should be allowed by court only to promote justice, but always excluded when unjust to the witness, and uncalled for by the circumstances of the case: *Turnpike Road Co. v. Loomis*, 32 N. Y. 127; 88 Am. Dec. 311.

COLEMAN v. REEL.

[75 IOWA, 304.]

ATTACHMENT — LIABILITY OF OFFICER FOR WRONGFUL LEVY. — Actual notice to officer that chattels upon which he is about to levy an attachment are mortgaged is sufficient to put him on inquiry, although he does not know to whom the mortgage was given, and if he goes on and makes the levy, he is liable therefor to the mortgagee in an action for the possession or the value of the property.

REPLEVIN. — JUDGMENT IN REPLEVIN WILL NOT BE REVERSED because of uncertainty in the description of the property, where the record, as a whole, sufficiently indicates and points it out.

EVIDENCE. — **ERRONEOUS ADMISSION OF EVIDENCE TENDING TO SHOW THAT PLAINTIFF** in replevin suit sustained special damages, by being deprived of the possession of the property, is no ground for the reversal of a judgment not including any damages.

ACTION to recover the possession or the value of certain personal property. The facts appear in the opinion.

Fremont Benjamin, for the appellant.

I. L. Statzell, for the appellee.

SEEVERS, C. J. It is stated in the petition that the plaintiff is the owner of "two red heifers, with some white in forehead, two years old; . . . one single buggy; . . . one iron-gray mare colt, about eight months old; . . . one bay spotted horse colt, about ten months old; . . . three Poland sows, and eleven pigs, about seven months old." And such ownership is claimed under a chattel mortgage executed by one Collver, which had been duly acknowledged and recorded. It is stated in the petition that notice in writing of plaintiff's ownership of said property had been duly served on the defendant, and a copy of such notice is attached to and made a part of the petition. It is further stated that the defendant had actual notice of the mortgage. The defendant denied the allegations of the petition, but admitted that he, as sheriff, took possession of the property under and by virtue of a certain writ of attachment against said Collver.

1. It is insisted that the court erred in permitting the mortgage to be introduced in evidence, because the description of the property therein is not sufficient, and that the recording of such mortgage did not impart constructive notice thereof. We find it unnecessary to determine this question, for the reason that there was evidence tending to show that the defendant had actual notice that the property was mortgaged. Such evidence was sufficient to warrant the court in making

the finding it did, and we cannot disturb it, under the settled practice of this court. The court was justified in finding that at the time the defendant made the levy he was notified that the property was mortgaged. This was sufficient to put him on inquiry, although he was not informed that the mortgage had been given to the plaintiff. We the more readily reach this conclusion, because we incline to think, taking the mortgage altogether, it was sufficient to impart constructive notice to the world.

2. We understand the record to show that all the property levied upon and described in the petition had been released by the defendant, except the two colts, and that the only controversy on trial was as to them. The value of the colts was proved to be one hundred dollars, and there is no evidence contradictory thereto. The court rendered judgment for the plaintiff for the "possession of the property in controversy, and in default of the return of said property," the court found the value thereof to be one hundred dollars, and judgment was rendered therefor for the plaintiff for that amount. It is insisted that the judgment is erroneous, because under it the plaintiff is entitled to the possession of all the property described in the petition. It would have been more definite and certain if the judgment had specifically described the property in controversy; but inasmuch as the record as a whole sufficiently indicates and points it out, we feel sure that the plaintiff is not entitled to have the judgment reversed.

3. It is insisted that the court erred in admitting evidence tending to show that the plaintiff sustained special damages by being deprived of the possession of the property. As the court did not render a judgment for any damages, the error, conceding it to be one, was not prejudicial. It is said that there is no sufficient evidence showing the service of the notice of ownership; but we think it was clearly sufficient, and that there is no error in this record.

Affirmed.

ATTACHMENTS. — AN OFFICER SEIZING UNDER AN ATTACHMENT WRIT PROPERTY not that of defendant cannot be lawfully resisted by the real owner, if he had at the time reasonable cause to believe the property to be that of the defendant in the attachment suit: *State v. Downer*, 8 Vt. 424; 30 Am. Dec. 482.

NOTICE. — ONE IS CHARGEABLE WITH ACTUAL NOTICE OF FACTS, IF HE HAS THE KNOWLEDGE of such facts as would lead a prudent man to make inquiries, and such inquiries, if pursued with ordinary diligence, would give

him knowledge of the facts, with the notice of which he is sought to be charged: *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295, and note 300.

JUDGMENTS. — IRREGULARITIES NOT PREJUDICIAL TO APPELLANT cannot be complained of as error: *Chever v. Horner*, 11 Col. 68; 7 Am. St. Rep. 217, and note 226.

NESBIT v. TOWN OF GARNER.

[75 IOWA, 314.]

NEGLIGENCE. — PRINCIPAL IS BOUND BY ACTS AND CONDUCT OF HIS AGENT, and if he suffers an injury through the negligence of another, but to which the negligence of his agent or servant, while engaged in the business of his employment, contributed, there can be no recovery.

NEGLIGENCE — IMPUTATION OF NEGLIGENCE OF DRIVER OF VEHICLE TO INVITED PASSENGER. — Where one rides upon the public highway in the vehicle of another, merely on invitation of the latter, and does not exercise or assume any control over the movements of the team, the driver of the vehicle does not become his agent or servant in such sense that his negligence, contributing to an injury occasioned by a defect or obstruction in the highway, will be imputed to him, so as to defeat his recovery in an action against the town.

NEGLIGENCE — PERSONS ENGAGED IN COMMON ENTERPRISE. — If several persons are engaged in a common enterprise, and one is injured by the joint negligence of an associate and another, the negligence of his associate will be imputed to him, and will defeat all right of recovery against such other. But the question whether they were engaged in a common enterprise should be submitted to the jury.

EVIDENCE. — IN ACTION FOR DAMAGES FOR PERSONAL INJURY CAUSED BY DEPRESSION IN STREET, EVIDENCE OF MEASUREMENTS of the depression, made some time after the accident, should not be excluded as incompetent on the ground that it did not appear that its condition then was the same as at the time of the accident, where the witnesses made such comparisons of its condition at the different times as afforded some *data* by which to determine its depth at the time of the accident.

ACTION to recover damages for a personal injury alleged to have been caused by a defect in a public highway which the defendant town was bound to maintain.

J. F. Thompson, C. H. Kelly, and L. S. Butler, for the appellant.

Bush and Wichman, and W. E. Bradford, for the appellee.

REED, J. 1. Plaintiff, when riding on one of the streets of the defendant town, was thrown from the vehicle in which he was riding, and sustained serious injuries. The accident happened at a plank crossing, constructed and maintained by the town, at the intersection of two streets. The negligence

alleged is, that the crossing was built above the level of the street, and that it was not so filled in on the sides as to form a proper and safe approach. The evidence tended to prove that the earth, which had originally formed the slopes from the level of the street to the top of the crossing, had been worn away on one side, and that the accident was caused by the dropping of the front wheels of the vehicle into this depression. Plaintiff resided in the country, and on the day of the injury he was invited by one of his neighbors to accompany him to the town. They were accompanied by William Sheridan, who had been in the employ of the neighbor, but his term of service had expired the day before. The vehicle in which they rode and the team by which it was drawn belonged to the neighbor. Some time after they arrived in town, plaintiff and Sheridan went to a shop for the purpose of procuring some shovels belonging to a brother of the owner of the team and wagon, which he had requested them to carry to the country for him, and it was when they were driving from the shop to another part of the town that the accident occurred. Sheridan was driving the team at the time, and plaintiff testified that he neither gave any direction as to the manner of driving, nor assumed any control over the team or its movements.

The district court gave the following instruction: "The law is, that the driver of a private conveyance is the agent or servant of the person riding in such conveyance, and if such person, while riding along a public highway or street, is injured in consequence of obstructions or defects negligently permitted to remain in the street or highway, and the driver is guilty of a want of ordinary care and caution, and his negligence materially contributes to such injury, then the persons injured cannot recover as against the town for the injury thus received." The principal question in the case is as to the correctness of this instruction.

That cases may arise in which the contributory negligence of another will be imputed to the one injured, and defeat his right of recovery for the injury, is certainly true, and that doctrine has been applied by this court. In *Payne v. Chicago, R. I. & P. R'y Co.*, 39 Iowa, 523, it was held that all right of action in plaintiff's favor for the injury he had sustained was defeated by the gross negligence of the driver of the vehicle in which he was riding.

In *Yahn v. City of Ottumwa*, 60 Iowa, 429, it was held that

the negligence of the plaintiff's husband, with whom she was riding at the time, contributing to the injury, would be imputed to her, and would defeat a recovery. But neither of those cases sustains the doctrine of the instruction. In the first case, the plaintiff and three others were riding together. The wagon and team belonged to one not a member of the party. It was under the control of one of the party, but at the time of the accident was being driven by another. The holding in the case is not based upon the idea that the relation of principal and agent existed between the plaintiff and the person who was driving the team at the time, but rests upon the fact that the parties were engaged in a common enterprise or purpose, in which each, to some extent, was responsible for the acts and conduct of the others. In the other case the evidence tended to show that the injury was occasioned by the act of the husband in driving upon an obstruction which was in plain view. The doctrine that his negligence is imputed to her does not rest upon any supposed agency of the husband, but upon the relation of the parties. Under such circumstances the wife is under the care of the husband. Her situation is very different from that of the friend or guest who, upon his invitation, rides with him for pleasure or convenience, but to whom he owes no special duty.

In *Slater v. Burlington etc. R'y Co.*, 71 Iowa, 209, the plaintiff, who was an infant of tender years, received the injury complained of when riding with his mother and natural guardian. The district court instructed that if the mother had negligently exposed him to the danger there could be no recovery. The correctness of that ruling was not controverted in this court upon the original submission; and we reversed the judgment against the defendant upon the ground that, under it and the undisputed testimony, the verdict should have been the other way. A petition for rehearing was afterwards filed, in which, and in an oral argument in support of it, the doctrine of the instruction was combated with great learning and ability. But we felt ourselves constrained to overrule the petition without considering the question as to the correctness of the instruction, on the ground that, whether correct or not, the jury were not at liberty to disregard it.

In *Stafford v. City of Oskaloosa*, 57 Iowa, 748, language is used which appears to support the doctrine of the instruction, and that case has been cited by other courts and text-writers

in support of it. When the record is looked into, however, it does not commit this court to the doctrine. In its facts it was similar to the present case. The plaintiff, by invitation of Clark, was riding with the latter, who owned and was driving the vehicle and team. The sleigh was driven upon an obstruction and overturned, and plaintiff was injured. The circuit court gave an instruction substantially the same as the one in question. The city was the appellant, and as the instruction was favorable to it, of course the appeal did not bring the question as to its correctness here for review. Nor was it contended that it was erroneous. In the eighth division of the opinion, in discussing another instruction, it is said that if Clark was negligent the plaintiff could not have recovered, whether he did or did not have knowledge of Clark's prior negligence,—that being the subject to which the instruction under consideration related. This language was used with reference to the law of the case as settled by the instruction, and which, upon the record before us, we could not review, but were bound to accept as correct, and was not intended as the annunciation of a general principle. The holding of those cases, then, is: 1. That when several parties are engaged in a common enterprise, and one is injured by the joint negligence of one of his associates and another, the negligence of his associate will be imputed to him, and will defeat all right of recovery against the other party; and 2. That when a person is injured through the common negligence of one, who, from their relation, is bound to care for and protect him, and another, the negligence of the former will be imputed to him, and will defeat a recovery against the other party. But that is as far as this court has gone. And we have never had occasion to consider the doctrine of the present instruction. That doctrine, in effect, is, that when one rides upon the public highway in the vehicle of another, the driver, as matter of law, becomes his agent or servant in such sense that his negligence, contributing to an injury occasioned by a defect or obstruction in the highway, will be imputed to him, regardless of the real relations of the parties. That this doctrine finds support in some of the adjudicated cases is certainly true. *Thorogood v. Bryan*, 8 Com. B. 115, is perhaps the leading case supporting the doctrine. In that case the plaintiff, having alighted from an omnibus, was run over and injured by a vehicle belonging to another line. The action was against the proprietor of the carriage which inflicted the injury; and it

was held that, as the driver of the vehicle from which the plaintiff alighted was negligent in that he had neglected to drive his carriage to the curb, which negligence contributed to the injury, there could be no recovery. The case, however, has been criticised in England (*The Milan*, Lush. 388), and it has not been generally followed in this country. Indeed, many American courts, whose opinions are of the highest authority, have pronounced it unsound: See *Bennett v. N. J. R'y & T. Co.*, 36 N. J. L. 225; 13 Am. Rep. 435; *N. Y. etc. R'y Co. v. Steinbrenner*, 47 N. J. L. 161; 54 Am. Rep. 126; *Chapman v. New Haven Ry Co.*, 19 N. Y. 341; 75 Am. Dec. 344; *Dyer v. Erie R'y Co.*, 71 N. Y. 228; *Transfer Co. v. Kelly*, 36 Ohio St. 86; 38 Am. Rep. 558; *Wasbash, St. L. etc. R'y Co. v. Shacklet*, 105 Ill. 364; 44 Am. Rep. 791; *Little v. Hackett*, 116 U. S. 366; 6 Sup. Ct. Rep. 391.

And we think the doctrine is contrary to sound reason and well-settled legal principles. Of course, the general doctrine that the principal is bound by the acts and conduct of his agent is not disputed. If he suffers an injury through the negligence of another, but to which the negligence of his servant or agent, while engaged in the business of his employment, contributes, there can be no recovery. But the relation of principal and agent must exist in fact. The law will not create or presume the relation from the mere fact that he accepted the invitation of another to ride in his carriage. If he is but the guest of the other, and neither has nor assumes the right to direct or control the conduct of the driver, neither he nor the owner can be regarded as his servant. In such case, he would not be answerable to a third person for an injury caused by the negligence of the driver; and it seems to us that there is no principle of law upon which such negligence can be imputed to him, when it contributes to his own injury. In the present case, the evidence tended to prove that plaintiff was riding in the vehicle, on the invitation of the owner, and that he neither exercised nor assumed any control over the movements of the team.

2. But it was contended that when plaintiff and Sheridan went with the team to the shop, they engaged in a common enterprise, and that the case is therefore within the rule of *Payne v. Railway Co.*, *supra*. But whether that was true was a question for the jury, and should have been submitted for their determination. The doctrine of the instruction, how-

ever, is, that if Sheridan's negligence contributed to the injury, there could be no recovery, whether that was true or not.

3. The court excluded the evidence of certain measurements made by plaintiff and others, some time after the accident, to determine the depth of the depression at the side of the crossing into which the wheels dropped. The ground of the ruling was, that it did not appear that the ground was in the same condition when the measurements were made as at the time of the accident. The witnesses, however, made such comparisons of its condition at the different times as that the measurements afforded some *data* by which to determine the depth of the depression at the time of the accident. The objection, we think, went rather to the weight of the evidence than to its competency, and it should have been overruled.

Reversed.

IMPUTED NEGLIGENCE. — WHERE PLAINTIFF ACCEPTED AN INVITATION FROM C. TO RIDE with him in his carriage, and while so riding was injured by a collision with defendant's engine, and C. was competent to manage a horse, the plaintiff was not chargeable with C.'s contributory negligence: *Robinson v. New York etc. R. R. Co.*, 66 N. Y. 11; 23 Am. Rep. 1, and note 4. One who is riding, and is injured by reason of a defect in the road, may recover against the municipality, although the negligence of the person driving, who was not his servant, contributed: *Town of Albion v. Hetrick*, 90 Ind. 545; 46 Am. Rep. 230. The contributory negligence of a driver of a private vehicle is to be imputed to one riding with him, as held in Wisconsin: *Prideaux v. City of Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558. A driver of a horse-car is not the agent of a passenger, so as to render such passenger chargeable with the driver's negligence: *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225; 13 Am. Rep. 435. The principle of concurrent negligence must be carefully applied, as it arises from a particular state of facts: *Pennsylvania R. R. Co. v. Kilgore*, 32 Pa. St. 292; 72 Am. Dec. 787.

NEGLECTENCE. — ONE WHO IS INJURED THROUGH THE NEGLIGENCE OF ANOTHER, while both are engaged in an unlawful transaction, will not be afforded any relief at law: *Wallace v. Cannon*, 38 Ga. 199; 95 Am. Dec. 385.

GRETHER v. CLARK.

[75 IOWA, 388.]

MORTGAGES — ADVERSE POSSESSION. — TITLE AND RIGHT OF POSSESSION OF LAND ARE IN MORTGAGOR, and so continue until divested by a sale and deed under foreclosure proceedings, and a grantee of the mortgagor before foreclosure acquires the same rights. He has absolute right of possession, which cannot be regarded as adverse to the mortgagee, unless accompanied with a denial of all right in the mortgagee; and this is true of the possession of the grantee of the mortgagor even after foreclosure, where such grantee was not made a party to the foreclosure proceedings.

MORTGAGE. — STATUTE OF LIMITATIONS HAVING COMMENCED TO RUN AGAINST ANCESTOR IN HIS LIFETIME, its operation is not suspended by his death in favor of his heirs; and the fact that some of them are minors does not affect the result, since the exception in their favor created by the Iowa Code, section 2535, applies only to causes of action which originally accrue in their favor. And where the ancestor foreclosed his mortgage, and purchased the property at the foreclosure sale, not making the grantee of the mortgagor, who was in possession, a party, and then died leaving minor heirs, his right of action to enforce the mortgage lien against such grantee accrued in his lifetime, and was barred as against his minor heirs in ten years after it accrued, though they had not then attained their majority.

Hull and Bicksler, for the appellants.

Crooks and Jordan, for the appellees.

REED, J. Plaintiff, Anna M. Grether, is the widow, and the other plaintiffs are the children and heirs at law, of John Grether, who died at Columbus, Ohio, in 1874. Prior to the eighteenth day of May, 1868, he was the owner of a tract of land in Boone County, and on that day he sold and conveyed the same to Margaret D. and O. J. Boyd, who gave him a mortgage on the property to secure a portion of the purchase-money. They subsequently gave a second mortgage to John P. Manny & Co. On the 25th of March, 1870, they sold and conveyed the premises to Hortense E. Soward, who, on the 15th of February, 1873, sold and conveyed to defendant Clark. He afterwards conveyed to Beck; but there was a subsequent reconveyance to Clark, who held the title when this suit was instituted. After the conveyance to Soward, but before Clark purchased, Grether brought suit for the foreclosure of his mortgage, making the mortgagors only parties. He recovered judgment for the amount of the debt, and a decree of foreclosure under which the land was sold, he being the purchaser, and a sheriff's deed was subsequently executed to him. Immediately after his purchase, Clark took possession of the premises, and continued in possession until the sale to Beck, and Beck was in possession until the reconveyance to Clark, since which time the latter has been in possession. The mortgage to John P. Manny & Co. was foreclosed, and defendant Clark bought the premises at the sale, and obtained a sheriff's deed thereunder in 1875; but neither plaintiffs nor John Grether were made parties to the foreclosure proceeding. This suit was instituted in August, 1885. Soon after Grether's death, an administrator of his estate was appointed by the probate court in Ohio, and it has been fully administered. At

the time of his death, his children were all minors, and two of them had not attained majority when the suit was instituted.

The defense relied upon is the statute of limitations. It will be observed that the grantees of the mortgagors had been in possession of the premises for more than ten years when the suit was instituted; and that possession was actual, exclusive, and continuous; and that possession is relied upon as creating a bar to the action. But the occupancy was under an absolute right of possession. Under our statutes, the title and right of possession is in the mortgagor, and they continue until divested by a sale and deed under foreclosure proceedings: *Hodgdon v. Heidman*, 66 Iowa, 645; *Green v. Turner*, 38 Id. 112; *Gower v. Winchester*, 33 Id. 303. The grantee of the mortgagor before the foreclosure acquires the same rights. He has absolute right of possession, which, before the conveyance, was vested in the mortgagor. His possession, then, would no more be adverse as against the mortgagee than would that of the mortgagor if he had continued in possession. It may be that the rule would be otherwise if the possession were accompanied with a denial of all right in the mortgagee. But we have no occasion to go into that question; for the possession in this case was not accompanied with such denial, nor can it be inferred from anything that was done by defendants. Their conduct and acts in the premises are all consistent with their right of possession, and are referable simply to that right.

The case turns, then, not upon the fact of possession, but upon whether any rights remain under the mortgage which may be enforced by plaintiffs. The right of action upon the note and mortgage accrued nearly sixteen years before this suit was instituted. As defendants were not made parties to the foreclosure suit, they were in no way affected by either the judgment rendered in that proceeding or the sale and deed thereunder. As against them, however, the lien of the mortgage continued, notwithstanding the foreclosure and sale, and Grether had a right of action against them for its enforcement. It is immaterial whether this right accrued at the maturity of the mortgage debt, or when the sheriff's deed was executed; for in either case it accrued to him in his lifetime, and the statute of limitations began to run at the instant it accrued. This right descended to plaintiffs upon his death, and it is the only right they ever acquired in the premises. It arose, not under the judgment of foreclosure, as was con-

tended by counsel, but under the mortgage; and if he had lived, would have been barred in ten years from the time it accrued. As the statute began to run during the life of the one in whose favor the right originally accrued, its operation was not suspended by his death; but as against his representatives, to whom the right descended, it continued to run. The fact that some of them are minors does not affect the result. The estate descended to them charged with all the limitations which attached to it in the hands of their ancestors. The exception in favor of minors created by the code, section 2535, applies to such causes of action as accrued originally in their favor, and has no application to such as come to them by descent, and against which the statute had already begun to run. This is clearly the doctrine of *Bishop v. Knowles*, 53 Iowa, 268. Upon this ground, therefore, the judgment of the district court is right.

Affirmed.

MORTGAGES. — IN NEW JERSEY, A MORTGAGE IS MERE SECURITY FOR DEBT OR LIABILITY for which it is given, and payment or satisfaction of the debt or liability discharges the mortgage, and reverts the mortgaged premises in the mortgagor without reconveyance: *Lindley v. O'Reilly*, 50 N. J. L. 636; 7 Am. St. Rep. 802; *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59. Ordinary mortgage is not evidence of right of possession in the mortgagee: *Berlack v. Halle*, 22 Fla. 236; 1 Am. St. Rep. 185, and note. Where no power of sale is embraced in the mortgage, the mortgagor or his grantee cannot, under any circumstances, in California, be cut off from his estate, except by sale in pursuance of a judicial decree: *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540.

MORTGAGES—FORECLOSURE OF. — GRANTEE OF MORTGAGOR IS A NECESSARY PARTY to foreclosure of a mortgage: *Berlack v. Halle*, 22 Fla. 236; 1 Am. St. Rep. 185, and note 189.

STATUTE OF LIMITATIONS. — THE STATUTE DOES NOT CEASE TO RUN AGAINST ONE claiming under a deceased, who was under no disability, and died without bringing suit: *McLeran v. Benton*, 73 Cal. 329; 2 Am. St. Rep. 814, and note 823.

SEDA v. HUBLE.

[75 IOWA, 429.]

WILL — VALIDITY OF BEQUEST IN TRUST FOR UNINCORPORATED RELIGIOUS SOCIETY. — A bequest of a certain sum of money to persons named, "in trust for the benefit of the Catholic Church on my farm in T. County," and directing "that they or their successors shall invest said money safely for the benefit of said church, and that service be held in said church for my soul yearly," is for a charitable use, clearly defined, and is not invalid on the ground that if the trustees misused the fund, no one could call them to account, nor because the testator conditioned it upon services being held yearly for his soul.

TRUSTS. — TRUST WILL NOT BE PERMITTED TO FAIL THROUGH FAILURE OR DISABILITY OF TRUSTEE to execute the trust, but will be supported upon the intention of the testator that the trust is attached to and fastened to the land, and that the land remains chargeable with it in the hands of the heirs or devisees.

W. H. Stivers and F. J. Horak, for the appellants.

Struble and Stiger, and Caldwell and Drahos, for the appellees.

SEEVERS, C. J. It is stated in the petition that Albert Patranek died in 1881, and that his last will had been duly admitted to probate; that the plaintiffs are the heirs of the deceased, and that the estate has been fully settled except as to the following bequest made in said will, that is to say: "I hereby give, devise, and bequeath to Franz Sevcik and Fred Huble, in trust for the benefit of the Catholic Church on my farm in Tama County, the sum of eight hundred dollars, and hereby direct that they or their successors shall invest said money safely for the benefit of said church, and that service be held in said church for my soul yearly." The plaintiffs claim in the petition that the bequest is void because the same is not for a charitable use; the church mentioned in the devise has no legal existence, and is not incorporated, and cannot be, under the rules of the Catholic Church and the statutes of this state. There was a demurrer to the petition, which being sustained, the plaintiffs appeal.

The devise is to Franz Sevcik and Fred Huble, in trust for the benefit of a specified Catholic Church. The parties named were to safely invest the money for the benefit of such church. This bequest, in our opinion, was for a charitable use, which was clearly identified. The intention of the testator is clearly expressed. There cannot be any doubt or uncertainty about it. Why should it not be upheld and carried into effect?

Because, it is said, the church indicated has no legal existence. This we understand to mean that it has not been incorporated; but clearly this is not material. The legal title to the money is in the persons named, coupled, however, with a trust. The beneficiary named is the "Catholic Church on my farm in Tama County, Iowa." Such church, or those who worship in the church edifice, are entitled to the benefits of the bequest. It clearly is not essential that such body of persons should be incorporated. It was so held in *Johnson v. Mayne*, 4 Iowa, 180.

Nor is it material, if true, as counsel contend, that the Catholic Church is prohibited from taking or "holding any property whatever"; because the money is not devised to the church, but to the parties named in the will. They take the money coupled with a beneficial interest, but in trust, to invest the same safely for the benefit of the church. They, therefore, are legatees charged by the testator with the duty of executing a charitable use and the benevolent purpose of the testator: *Perry v. Drury*, 56 Iowa, 60.

Possibly the trustees may misuse the fund devised to them. Who is to call them to account? is asked by counsel. In reply, it is sufficient to say that "it is the settled doctrine of the courts, in the construction of wills and the administration of trusts, that a trust shall never be permitted to fail through the failure or disability of the trustee to execute the trust, but shall be supported upon the intention of the testator; that the trust is attached to and fastened to the land, and that the land remains chargeable with it in the hands of the heirs or devisees": *Johnson v. Mayne*, 4 Iowa, 195; *Miller v. Chittenden*, 4 Id. 252.

It is said the devise is void because the testator made it upon the condition that services were to be held yearly in said church for the soul of the testator. We do not understand that the bequest is based on such condition. That the testator desired that such services should be held may be conceded; but that it was his intention that if they were not the bequest was to cease, or not take effect, we do not believe. The devise took effect at once, and attached to the money. The trustees could enforce the trust. They could maintain the action for the recovery of the money, and the trust attached thereto in their hands. It became their duty to invest it as directed. The trust was then, it can be fairly said, executed, and in no respect was it conditional on the performance of the

yearly services named, and such was not the intention of the testator.

To our minds, the bequest is so clearly expressed, the trust so certainly established, and the beneficiary so clearly indicated, that it is unnecessary to support the foregoing view by a citation of authorities to any greater extent than has been done.

Affirmed.

WILLS — CHARITABLE USES. — DEVISES AND BEQUESTS TO CHARITABLE USES, WHEN VOID AND WHEN VALID, with respect to their certainty and uncertainty: See note to *Eutaw etc. Church v. Shively*, 1 Am. St. Rep. 415; note to *Raley v. Umatilla County*, 3 Id. 152. Charitable uses, what bequests to, sustainable: Note to *Holland v. Alcock*, 2 Id. 440. Religious uses, as to mode of creating: See note to *Holland v. Alcock*, 2 Id. 440.

HIBBARD v. ZENOR.

[75 IOWA, 471.]

MORTGAGES. — THIRD PERSONS ARE NOT CHARGED WITH CONSTRUCTIVE NOTICE OF CHATTEL MORTGAGE until the proper entries required by the statute (Iowa Code, section 1925) have been entered by the recorder in the index; and this rule is not affected by a custom of the recorder, when instruments are delivered to him to be recorded near the close of business on one day not to enter them in the index until the next morning.

ATTACHMENT. — LEVY UPON GOODS IS NOT ACCOMPLISHED until the officer has done some act with reference to the goods which would but for the writ amount to a trespass, and the levy will be valid and operative from that time only, and will not operate by relation from the time prior steps were taken to make the levy.

PLEADING AND PRACTICE — APPEALS. — CAUSE WILL NOT BE REVERSED BY APPELLATE COURT BECAUSE OF ERRONEOUS INSTRUCTION from which no prejudice could result, but where the jury find generally for the defendant on all the issues, and the court erred in the instruction, unfavorably to the plaintiff, as to one of them, and it cannot be determined that the jury did not act under such instruction in finding their verdict, prejudice to the plaintiff must be presumed, and the cause will be reversed.

PLEADING AND PRACTICE — INSTRUCTION TO JURY NOT MISLEADING. — An instruction to the jury that the delivery of a chattel mortgage to the recorder, and the stamping of it as filed by him, is not a record imparting constructive notice, and concluding, "Nor will any person be bound by the record or notice of such instrument until the proper description thereof is entered in the entry-book or index-book," is not misleading, where, in another part of the instruction, the jury were told in clear and express terms that actual notice would bind as effectually as the record would have done if made.

ATTACHMENT. — LEVY OF ATTACHMENT ON MORTGAGED CHATTELS IS NOT VOID, although the amount of the debt secured by the mortgage is not paid or tendered, as required by the Iowa statute (Laws of 1886, chapter 117, sections 1 and 4), in a case where an attaching creditor attacks the validity of the mortgage. And the provisions of said statute do not affect the requirement prescribed by Laws of 1884, chapter 45, that persons asserting claims to the mortgaged property must give notice of their claims to the attaching officer.

ACTION by the plaintiffs, claiming under a chattel mortgage, to recover specific personal property which the defendant seized by virtue of writs of attachment sued out by creditors of the mortgagor. He disputes the plaintiffs' claim, on the grounds: 1. That neither he nor the attaching creditors had notice of the mortgage before the levy; 2. That no notice of plaintiffs' claim was served upon him, as required by statute, before the suit was commenced; 3. That the mortgage was given to defraud the creditors of the mortgagor; and 4. That the mortgage was voluntarily executed by the mortgagor without the knowledge of the plaintiffs, but was not delivered until after the levy. Verdict and judgment for the defendant, and the plaintiffs appealed.

E. L. Greene and Loren W. Reynolds, for the appellants.

Crooks and Jordan, and Hull and Bicksler, for the appellee.

REED, J. The mortgage under which plaintiffs claim was given to secure a promissory note for seven thousand five hundred dollars. The evidence tended to prove that Hall & Co. were indebted to plaintiffs in that amount, and that they, on the 28th of December, 1886, executed their promissory note for the amount, and to secure the same gave a chattel mortgage on their stock of goods and merchandise. They were anxious, however, to continue their business; and being apprehensive that other creditors would close them up by attachment if the fact of its execution should become known to them, they requested plaintiffs to withhold it from record, and promised that they would execute another mortgage on the same property, and place the same on record at any time in the future when there should appear to be danger that plaintiffs might lose the security. Plaintiffs assented to that arrangement, and accordingly withheld the mortgage from record. On the 7th of January following, Hall & Co. became satisfied that they could not continue the business, and on that day they executed the mortgage now sued on, and deliv-

ered it to the recorder to be recorded at 6:30, p. m. The recorder indorsed on the back of the instrument his certificate that it was filed for record at that hour, but he did not enter it in the record index until 8:30 the next morning. At about eight o'clock on the evening of the 7th, defendant received a writ of attachment issued in the suit of *Baker Wire Co. v. Hall & Co.* He immediately went to the store for the purpose of making a levy, but finding it closed, he left a watchman at the building, and went to the home of John C. Hall, senior member of the firm, and demanded of him the key to the store. Hall informed him that a mortgage had been placed on the stock, and refused to surrender the key. Subsequently another writ, issued in the suit of *McCormick Harvesting Machine Co. v. Hall & Co.*, was placed in his hands, and at eleven o'clock on the same evening he returned to the store, and effected an entrance through a window, and seized the goods. On the 10th of January, a landlord's attachment, sued out by the owners of the building for rents accruing within one year, was placed in his hands, and he levied the same on the property. Each of these suits was prosecuted to a judgment, and special executions were ordered for the sale of the attached property. It was conceded that the landlords had the superior lien on the property. Plaintiffs intervened in that action, and tendered the amount of the judgment, and the court entered an order requiring the landlords to accept the tender, and subrogating plaintiffs to their rights under the judgment. The verdict determines that the interest of defendant in the property, which had been delivered to plaintiffs under the order issued by the clerk, was the amount of the judgment recovered by the Baker Wire Company and the McCormick Harvesting Machine Company, and a nominal amount for that obtained by the landlords, and he elected to take a money judgment for those amounts.

1. On the trial, plaintiffs offered evidence to prove that it was a custom of the recorder, when instruments were delivered to him to be recorded near the close of business on one day, not to enter them in the index until the next morning; but the court excluded the evidence, and instructed the jury that defendant was not charged with constructive notice of the mortgage until the proper entries thereof were made in the index. These rulings are clearly right. The notice created by the record of an instrument is constructive. The implication or presumption that those dealing with reference to the

property affected by the instrument have notice of such facts as are shown by the record is raised by the statute, and the whole subject is governed and limited by it. Under section 1925 of the code, it is the duty of the recorder, when an instrument of the character of that in question is deposited with him to be recorded, to note thereon the day and hour of filing, and enter in the entry-book or index the names of the mortgagor and mortgagee, the dates of the instrument and the filing, and the nature of the instrument; and the section also provides that from the time of such entry the instrument shall be deemed complete as to third persons. Under this provision there can be no question as to the time when the record becomes notice to the world of the instrument. When the prescribed entries are made, any person desiring information with reference to the property, by an inspection of them, would learn of the existence of the mortgage, and he is charged with notice of its existence, whether he makes such examination or not. But until they are made, the record, which is the source to which he is bound to go for information, is silent, and it is the only instrument by which he can be charged with the constructive notice.

2. There is some conflict in the evidence as to whether Hall informed defendant, when the demand was made for the key, that plaintiffs were the parties to whom the mortgage had been given. It was undisputed, however, that he informed him that a mortgage on the stock had been executed. The district court instructed that if defendant was informed, before the levy was made, that plaintiffs held a mortgage, or if he was then informed of such facts as would have put a reasonable man upon an inquiry which would have led to the discovery that plaintiffs held the mortgage, and the notice to surrender the property prescribed by the statute had been served upon him before the suit was instituted, plaintiffs would be entitled to recover. The general verdict does not necessarily imply a finding in favor of defendant on either of these questions. Neither are they determined by the special findings. The general verdict may have been based upon a finding that the levy was complete before the information with reference to the mortgage was imparted to defendant. On that question, the court gave the following instruction: "To constitute a good levy upon personal property, the officer must have such property within his dominion and control, and must, within a reasonable time, reduce the same to his

actual possession. If you find that the defendant, having in his possession the writs in question, went to the store of Hall & Co. for the purpose of levying them upon the goods kept in said store, and, on attempting to enter, found the building locked, and thereupon, in pursuance of his intention to make such levy, placed a guard on the premises to maintain and protect his possession and dominion over the property, while he himself went for a key with which to effect an entrance, and within a reasonable time returned and unlocked or broke open the building, and took actual possession of the goods, such acts would constitute a good and sufficient levy from the time he first went upon the premises with intent to make the same."

In our opinion, this instruction cannot be sustained. It holds, in effect, that if defendant, when he placed the guard on the premises, intended to maintain possession and dominion over the property, and thereafter, within a reasonable time, effected an entrance and actual seizure of the goods, the levy is to be regarded as complete from the time he first attempted to enter the building. But whether a levy was accomplished depends upon the effect of what was done, rather than upon the intent with which it was done. To constitute a levy, the sheriff must, if the property is capable of manual delivery, take actual possession of it: Code, sec. 2967. He must do that which would amount to a change of possession, or which would be equivalent to a claim of dominion, coupled with a power to exercise it: *Crawford v. Newell*, 23 Iowa, 453; *Bickler v. Kendall*, 66 Id. 703. Now, while the act of placing the guard on the premises may have amounted to a claim of dominion over the property, it did not necessarily carry with it the power to exercise that dominion; for it did not necessarily have the effect to exclude the owners from the building, or prevent them from assuming the control and care of the property; and they were not necessarily deprived of possession by it. We do not hold that an actual seizure of the goods, or even an entry into the building, was essential to the accomplishment of the levy. But it was not accomplished until defendant had done some act with reference to the property sought to be seized which would but for the writ have amounted to a trespass; and the levy would be valid and operative from that time only. And it would not operate by relation, as the instruction holds, from the time the prior steps were taken.

But it was contended that the general verdict is a finding for defendant on all of the issues in the case, and hence, as the answer pleaded a number of matters, either one of which constitutes a perfect defense to plaintiffs' claim, we ought not to reverse because of the error in the instruction, which related to but one of them. But this claim is not sound. The jury found specially against defendant on the issue that there was no delivery of the mortgage before the levy. They found specially that the mortgage was executed and delivered to the recorder for record in pursuance of previous agreement between the parties to it. That was a sufficient delivery, and as between the parties, the mortgage was operative from that time: *Everett v. Whitney*, 55 Iowa, 146. So that the general verdict could not have been found under that issue. It must have been found under one or all of the others. Now, the evidence which tended to establish the allegation of fraud is exceedingly meager. Indeed, if it could be determined from the record that the verdict was found under that issue alone, it would be exceedingly doubtful whether it could be sustained. There was a fair conflict in the evidence on the question whether there was a valid service of the notice to return the property, and under it the jury might have found against defendant on that question. The verdict, then, may have been found alone under the issue to which the instruction related. If so, the instruction was prejudicial. Now, while we will not reverse because of an erroneous ruling from which no prejudice could have resulted, the presumption, in the absence of anything in the record to the contrary, is that such ruling was prejudicial. And as it cannot be determined in the present case that the jury did not act under the instruction in question in finding their verdict, that presumption arises, and we must be governed by it.

3. In another instruction the court used the following language: "The delivery of the instrument to the recorder, and the stamping of the same as filed by such recorder, is not a record which will impart constructive notice; nor will any person be bound by the record, *or notice of such instrument, until the proper description thereof is entered in the entry-book or index-book*, as provided by law." Appellants, while denying the general doctrine of the instruction, a question which we have already considered, took special exception to that portion of it which we have italicized. Counsel contended that the jury might well have understood from that

language that even actual notice to defendant of the mortgage would not bind him, unless the proper entry had been made in the index before the notice was given. It is very apparent, however, from the whole instruction, that the thought intended by the court is directly the opposite of that. Indeed, in another part of the instruction the jury were told, in clear and express terms, that actual notice to defendant of the mortgage, before the levy, would bind him as effectually as the record would have done if it had then been made. While the particular language, then, standing alone, does not accurately or fully express the meaning of the court, it is very clear, we think, that the jury could not have been misled by it.

4. It is contended that, as defendant did not pay or offer to pay the amount of the debt secured by the mortgage, as provided by chapter 117, Laws Twenty-first General Assembly, the levy is void; and hence it was not necessary to serve the notice of ownership prescribed by chapter 45, Laws 1884, before instituting the suit. Section 4 of the act provides, however, that nothing contained in the act shall in any way affect the right of the creditor to contest for any reason the validity of the mortgage. The creditors were contesting the validity of the mortgage on the grounds: 1. That it was fraudulent; 2. That it had never been delivered; and 3. That they had no notice of it, which, if true, rendered it invalid as to them. The provisions of the act have no application when the mortgage is sought to be avoided on these grounds, and the requirement for notice is not affected by them. For the error pointed out, the judgment will be reversed.

RECORDING. — OBJECT OF RECORDING DEEDS AND INSTRUMENTS IS TO GIVE notice to third parties, and, except as a matter of notice, an unrecorded title is as good as if recorded: *Evans v. Templeton*, 69 Tex. 275; 5 Am. St. Rep. 71, and note. An index of the record of conveyances, by law required to be kept by the public recorder, but in which he is not required to state the amount of the consideration of instruments recorded, is not notice to a purchaser for a valuable consideration of such amount, although it states it: *Gilchrist v. Gough*, 63 Ind. 576; 30 Am. Rep. 250; but a grantee of realty is not chargeable with an error of the clerk in recording a deed to the injury of subsequent purchasers: *Mangold v. Barlow*, 61 Miss. 593; 48 Am. Rep. 84. A deed or mortgage must be legally recordable and duly recorded according to law to make the record thereof constructive notice: *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772. Where the statute required the register of deeds to keep an index, and to enter therein every instrument received for record, and declared "that the instrument shall be considered as recorded at the time so noticed," and where the instrument as recorded in full ap-

peared defective in some material parts not supplied by the index, the latter did not operate as constructive notice: *Id.* A deed actually recorded, if not entitled to record, is not constructive notice, but if actually seen, is actual notice: *Musgrove v. Bonser*, 5 Or. 313; 20 Am. Rep. 737. Index of recorded instrument will hold subsequent purchaser to notice thereof, if enough is disclosed by such index to put a prudent examiner upon inquiry, and if upon such inquiry the instrument would have been found: *Jones v. Berkshire*, 15 Iowa, 248; 83 Am. Dec. 412. Actual notice countervails the effect of registry, and dispenses with it: *Hoge v. Hult*, 94 Mo. 489.

ATTACHMENT—LEVY.—TO CONSTITUTE A VALID LEVY, THE OFFICER MUST DO SUCH ACTS as but for the protection of the writ would amount to a trespass: *Allen v. McCalla*, 25 Iowa, 464; 96 Am. Dec. 56; and an officer who attaches goods which are exempt by law from attachment is a trespasser: *Kiff v. Old Colony etc. R'y Co.*, 117 Mass. 591; 19 Am. Rep. 429. Levy is incomplete without actual seizure or some other equivalent act of universal notoriety: *State v. Poor*, 4 Dev. & B. 384; 34 Am. Dec. 387.

INSTRUCTIONS.—ERRONEOUS INSTRUCTIONS WHICH RESULT IN NO HARM TO APPELLANT are no ground for reversal: *Stumone v. Shaw*, 68 Md. 11; 6 Am. St. Rep. 412, and note 417; *Merchants' D. T. Co. v. Block Brothers*, 86 Tenn. 892; 6 Am. St. Rep. 847.

WEYAND v. ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY.

[75 IOWA, 572.]

JURISDICTION—FORMER ADJUDICATION.—ACTION, WHEN AIDED BY ATTACHMENT, MAY BE MAINTAINED in courts of Iowa, under section 2580 of the code, against a foreign corporation having property within the state; and the dismissal by a federal court in that state of a former action for the same cause, but not aided by attachment, on the ground that jurisdiction of the defendant had not been acquired, is no bar to the subsequent action in the state court commenced by attachment.

BILL OF LADING IS NON-NEGOTIABLE INSTRUMENT, and possession thereof is not *prima facie* evidence of ownership, as in the case of a bill of exchange or promissory note.

COMMON CARRIERS—LIABILITY FOR WRONG DELIVERY OF GOODS.—A canning company shipped goods upon the order of one E., consigned to itself at P., where E. lived, taking two bills of lading, in fact duplicates, but neither showing that another had been issued. It then drew on E., through a bank at P., for the price, also sending to the bank an order on the carrier to deliver the goods to E., with directions to the bank to deliver the order to E. upon payment by him of the draft. At the same time the canning company sent one of the bills of lading to E., instructing him that the goods had been shipped, and that he was to pay the draft and obtain the order, such bill of lading not being indorsed or assigned by that company, and showing that the goods were consigned to the shipper. Upon presentation of this bill of lading, the carrier delivered the goods to E., who was at the time insolvent, and had never paid for the goods. Under this state of facts, the delivery

was unauthorized, and the carrier became liable to the canning company for the value of the goods, although it was ignorant of the fact of E.'s insolvency, and that the goods had not been paid for, and that a draft and order had been sent in regard to the goods, but delivered them in good faith.

COMMON CARRIER — CUSTOM. — EXISTENCE OF LOCAL CUSTOM TO DELIVER GOODS TO PERSON HOLDING UNINDORSED BILL OF LADING, unknown to the consignor when the goods were shipped, is no defense to an action for the value of goods so delivered.

ACTION, aided by attachment, brought to recover the value of certain goods shipped by the plaintiff, and alleged to have been delivered to a person not entitled to receive them, through the fault of the defendant. The plaintiff had judgment for the amount admitted to be the value of the goods, and sustaining the attachment. The defendant appealed. On the first submission of this cause, a decision was rendered by this court reversing the judgment of the superior court. A rehearing was ordered on the petition of the appellee, and the cause again submitted.

George R. Peck, and Anderson, Davis, and Hagerman. for the appellant.

Henry Rickel, for the appellee.

ROBINSON, J. Plaintiff is the trustee of the Elgin, Iowa, Canning Company. Defendant is a corporation organized and existing under the laws of the state of Kansas, and engaged in operating a line of railway from Kansas City through the states of Kansas and Colorado, and to the city of Pueblo, in the last-named state. At the time this cause was tried in the court below, defendant had never owned nor operated any railway within the state of Iowa. In October, 1884, one Evans, of Pueblo, ordered of the canning company the goods in controversy. Not being acquainted with Evans, and not wishing to sell the goods on credit, it delivered them, marked and consigned to itself at Pueblo, to a railway company at Elgin, Iowa. From that company the canning company took two receipts or bills of lading, which were in fact duplicates, but neither showed that another had been issued. The canning company drew a draft on Evans, through a bank in Pueblo, for the price of the goods, and sent to the bank an order on defendant to deliver the goods to Evans. The draft and order were sent together to the bank, with instructions to deliver the order to Evans upon payment by him of the draft. At the same time the canning company sent to Evans one of

the bills of lading, instructing him that the goods had been shipped, and that he was to pay the draft and obtain the order. The bill of lading sent to Evans was not signed nor indorsed by the canning company. In due time the goods were transferred by the railway company which first received them to defendant, and were by it transferred to Pueblo. Evans never paid the draft nor obtained the order, but within twenty-four hours after the arrival of the goods in Pueblo, he presented the bill of lading which he had received to defendant, and without other authority obtained the goods. At that time Evans was insolvent, but defendant had no knowledge of that fact, nor that the goods had not been paid for, nor that a draft and order had been sent, or instructions given in regard to the goods, but delivered them in good faith. The canning company commenced an action to recover of defendant the value of the goods in question, which was transferred to the circuit court of the United States for the northern district of Iowa. The answer in that case alleged that defendant was a corporation, organized and existing under the laws of Kansas, for the purpose of operating a line of railway, but was not organized for the purpose of nor engaged in operating a railway within this state; that no part of the road of defendant was or had ever been operated in this state, and that the claim of plaintiff did not grow out of, and was not in any manner connected with, any office or agency of defendant in this state. A demurrer to that answer was overruled and in consequence the canning company dismissed its action. It afterwards appointed plaintiff, who is a citizen of Kansas, its trustee to collect the claim in suit. This action was commenced, and the Burlington, Cedar Rapids, and Northern Railway Company, a corporation doing business and with its principal office in Linn County, was garnished by virtue of the attachment process. The answer of the garnishee showed that it had in its possession, when garnished, the sum of fifteen hundred dollars, which belonged to defendant.

1. Appellant insists that the superior court had no jurisdiction in this cause, for reasons set out in its answer in the action which was transferred to the federal court, and that the question of jurisdiction of the claim in suit was finally adjudicated in that action. The opinion of the federal court is found in 24 Fed. Rep. 866. We do not regard the decision of that court as conclusive of the right of plaintiff to maintain this action, even though it be conceded to have the force and

effect of a final adjudication. It was based upon the facts as they existed in that case. It did not pass upon the right of the canning company to recover of defendant excepting in that action, "under the facts disclosed in the record" therein. One vital fact was, that no attachment of property of defendant was disclosed. The defendant, at the time this action was commenced, had never owned nor operated a line of railway in this state, nor had it ever had therein any office or agency out of which plaintiff's cause of action grew. Therefore neither of sections 2582 and 2585 has any application to the case. The defendant was not found within this state, and had no residence therein; hence section 2586 of the code does not apply. Section 2580 provides as follows: "An action, when aided by attachment, may be brought in any county of the state wherever any part of the property sought to be attached may be found, when the defendant whose property is thus pursued is a non-resident of this state." The legal home of defendant is in the state of Kansas: *Ex parte Schollenberger*, 96 U. S. 369. It is a non-resident of this state, and having property in Linn County when this action was commenced, falls within the provision quoted. The federal court decided that jurisdiction of the defendant had not been acquired, and therefore that judgment could not be rendered against it.

This action is in the nature of a proceeding to subject certain property found within the jurisdiction of the superior court to the payment of plaintiff's claim. The first was a personal action, and jurisdiction of defendant was necessary to its presentation. This is in the nature of an action *in rem*, and the court, having jurisdiction of the property sought to be appropriated, could acquire such jurisdiction of the defendant as was necessary for the purposes of the action, by the personal service of the original notice, or by its publication. It will hardly be claimed, if defendant engaged in operating a line of railway within this state after the action in the federal court had been dismissed, that the decision in that action would bar a second suit. In our opinion, there is no more reason for holding it to be a bar in this action than there would have been in the case supposed. The case of *Ex parte Railway Co.*, 103 U. S. 794, is not in conflict with the views we have expressed. Section 739 of the Revised Statutes of the United States prohibits the bringing of a civil suit other than a suit in equity to enforce a lien against an inhabitant of the United States by original process in any other district than that of

which he is an inhabitant, or in which he is found at the time of serving the writ. Section 2, chapter 121, 21 United States Statutes at Large, page 155, requires civil suits not of a local nature to be brought in the division of the district of Iowa where the defendant resides, and the case last cited was based upon those statutes. But sections 2582 and 2585 of the code are not restrictive, but were designed to give to plaintiffs additional facilities for bringing actions against the parties therein named. There is no ground for believing that the general assembly designed to exempt the property of non-resident corporations from judicial process in any case where the property of other non-resident debtors could be taken.

2. Appellant insists that it was not in fault in delivering the goods to Evans, for the reason that the delivery to him of the bill of lading was in effect an assignment of the goods, and invested him with a right to demand and receive them. We are referred to many authorities which are claimed to support this view. One of these is *Merchants' Bank v. Union R'y & Trans. Co.*, 69 N. Y. 374. An examination of that case and of the cases therein cited will show that what the court really decided was that a delivery of the forwarder's receipt without assignment, but with intent that the title to the goods for which it was given, or an interest therein, should be thereby transferred, would be effectual to accomplish the transfer intended. Other authorities cited by appellant are to the same effect. In this case it was the intention of the canning company to retain the title and right of possession in itself until the price of the goods should be paid. The bill of lading required the delivery of the goods to the consignor. It did not provide for delivery to bearer or order, but to the Elgin Canning Company. Therefore it is clear that the forwarding of the bill of lading to Evans, with directions to pay the draft and obtain the order for the goods, did not invest him with any right to the goods as against the consignor. But it is said that defendant was justified in delivering the goods to Evans because of his possession of the bill of lading. The cases of *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. *838, with annotations, *Dows v. Greene*, 24 N. Y. 638, *Allen v. Williams*, 12 Pick. 297, and others, are cited in support of this claim. It is true that statements were made in some, if not all, of those cases, which, considered apart from the connection in which they are found, might seem to sustain the claim; but when they are considered in connection with the facts of the cases

where found, and the general conclusions of the court which made them, we think they go no further than to hold that the delivery of an unindorsed bill of lading would be a good symbolical delivery of the goods it represented, where such was the intent and purpose of the parties. In *Fearon v. Bowers*, reported in 1 Smith's Lead. Cas. *782, cited by appellant, the consignor had sent two bills of lading, one of which was indorsed to one person and the other to another, and the court held that a delivery might be made to the holder of either bill. That case has but little relation to the principle involved in this. Appellant insists that the bill of lading is like a promissory note, in that possession is *prima facie* evidence of ownership; but we do not think that such is the case. A bill of lading is a non-negotiable instrument: *Garden Grove Bank v. Humeston & S. R'y Co.*, 67 Iowa, 534.

The following language is pertinent: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. . . . They are in commerce a very different thing from bills of exchange and promissory notes, answering a different purpose and performing a different function." Also: "It is not a representative of money, used for transmission of money or for the payment of debts or for purchases. It does not pass from hand to hand, as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods; but if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen": *Shaw v. Railroad Co.*, 101 U. S. 557; see also Hutchinson on Carriers, sec. 348. In 2 Parsons on Contracts, 292, it is said: "The consignor frequently sends to a consignee a bill not indorsed, and then sends to his own agent in or within reach of the same port an indorsed bill,—it may be indorsed in blank, or to the agent, or to the party ordering the goods,—and the consignor sends to his agent with the bill orders to deliver the bill to the party ordering the goods, or to receive the goods and deliver them to him, provided payment be made or secured, or such other terms as the consignor prescribes are complied with. This course secures to the consignor, beyond all question, the right and power of retaining the goods until the price for them is paid or secured to him." This is not only in point, but seems to be sound in principle. The fact

that Evans presented the bill of lading in this case was not sufficient to overcome the presumption which the terms of the bill raised, that the consignor was the owner of the goods. That such is the presumption is well established: *Congar v. Galena & C. U. R'y Co.*, 17 Wis. 485; *Krudler v. Ellison*, 47 N. Y. 37; 7 Am. Rep. 402; *Lawrence v. Minturn*, 17 How. 100; *Alderman v. Eastern R'y Co.*, 115 Mass. 234; see also *Tuttle v. Becker*, 47 Iowa, 486; 1 Benjamin on Sales, secs. 577, 579; 2 Am. & Eng. Cyclop. Law, 242, 243. The contract with the canning company required the defendant to deliver the goods to the consignor. The unindorsed bill of lading presented by Evans was evidence that the contract was still in force, and that the canning company was then the owner of the goods. The delivery to Evans was not authorized, and was made by defendant at its own risk: Hutchinson on Carriers, secs. 129, 130, 344. But it is said that the canning company clothed Evans with the apparent right to demand the goods, and that since "one of two innocent parties must suffer a loss from the wrong of another, the loss should fall upon the party who put it in the power of that other to perpetrate the wrong." This case does not fall within that rule, for, as we have seen, the possession of the bill of lading, without indorsement or other evidence of assignment, did not vest Evans with any apparent right to the property. The loss resulted from the negligence of defendant in not insisting upon proper evidence of an assignment before it surrendered the goods.

3. It is insisted by appellant that the delivery to Evans was made in accordance with the custom at Pueblo, and that the contract of shipment must have been made with reference to that custom. The superior court found that by a local custom at Pueblo goods shipped over railway lines to that place were delivered to the person who held the bills of lading, but that the custom was not general, and plaintiff had no knowledge of it. The contract of shipment required defendant to deliver the goods to the canning company, and we question the right of defendant to vary this by showing a custom in conflict with it. The contract was not ambiguous, and required no explanation. But where a custom may be shown, it must appear that it was so general that the parties to the contract will be presumed to have contracted with reference to it: *Couch v. Watson Coal Co.*, 46 Iowa, 20; *Berkshire Woolen Co. v. Procter*, 7 Cush. 422; *Fay v. Alliance Ins. Co.*, 16 Gray, 461; *Wilson v. Bauman*, 80 Ill. 494; 2 Greenl. Ev.,

sec. 251. The court below not only found that the custom pleaded was local, but that plaintiff had no knowledge of it. How the knowledge of plaintiff would affect the contract does not appear, but knowledge on the part of the carrying company when the shipping receipt was taken is not pleaded nor is it shown. Therefore this defense is not maintained: *Wells v. Bailey*, 49 N. Y. 473; 10 Am. Rep. 407; *Higgins v. Moore*, 34 N. Y. 425; *North Penn. R'y Co. v. Commercial Bank*, 123 U. S. 727; 8 Sup. Ct. Rep. 266; Clarke's *Browne on Usages and Customs*, 134, note 4. The further examination which we have given this cause on rehearing leads us to conclude that the first decision of this court was erroneous.

The judgment of the superior court is affirmed.

TO WHOM CARRIERS MAY LAWFULLY DELIVER PROPERTY. — *Delivery to the Real Consignee or his Agent.* — Where the responsibility of a common carrier of goods has once begun, it continues until due delivery of the goods has been made to the right person, or until the responsibility of some other party begins: *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109; 100 Am. Dec. 541, and note 545; *Graff v. Bloomer*, 9 Pa. St. 114; *Parker v. Flagg*, 26 Me. 181; 45 Am. Dec. 101; *North Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727. And the consignee is the person *prima facie* entitled to demand and receive the goods from the carrier at the place of destination: *Southern Express Co. v. Caperton*, 44 Ala. 101; 4 Am. Rep. 140; *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256. And failure on the part of the carrier to deliver the property to the consignee on demand at the place of destination is *prima facie* evidence of negligence, which, in the absence of any evidence excusing the non-delivery, presents a question of fact for the jury: *Canfield v. Baltimore etc. R. R. Co.*, 93 N. Y. 532; 45 Am. Rep. 268; *Claffin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Magnin v. Dinsmore*, 56 N. Y. 168. So if goods are left with the carrier to be delivered to the consignee without any qualification or restriction, the consignor cannot, by a subsequent direction to the carrier, prevent their delivery to the consignee, unless such facts are shown as will justify the stoppage of the goods *in transitu*: *Philadelphia etc. R. R. Co. v. Wireman*, 88 Pa. St. 264. Compare *Cleveland etc. R. R. Co. v. Sargent*, 19 Ohio St. 438. Delivery by the carrier to an agent of the true consignee is of course a sufficient delivery. But in an action for non-delivery, the defense that the goods were delivered to an agent must show that the person to whom they were delivered as agent was duly authorized as such: *Adams v. Blankenstein*, 2 Cal. 413; 56 Am. Dec. 350, and note 352; *Nebenzahl v. Fargo*, N. Y. Com. Pleas, 1889. If the goods are delivered to a drayman, cartman, or any one else not authorized by the consignee to receive them, it is at the carrier's risk: *Dean v. Vaccaro*, 39 Tenn. 488; 75 Am. Dec. 744; *Herman v. Goodrich*, 21 Wis. 356; 94 Am. Dec. 562; *American Express Co. v. Greenhalgh*, 80 Ill. 68. And a cartman is not to be regarded as the general agent of the consignee for receiving goods without orders merely because he is frequently or exclusively employed by the consignee in carting goods according to his orders: *Ostrander v. Brown*, 15 Johns. 39; 8 Am. Dec. 211. So if the carrier delivers the goods to a general agent of the consignor resident at the point of destination, without any authority from either the consignor or consignee,

and the goods do not come safely to the hands of the consignee, the carrier is liable: *Ela v. Am. Mer. Un. Ex. Co.*, 29 Wis. 611; 9 Am. Rep. 619. And this is so, although the consignee does not reside at the point where the goods are to be delivered, and does not expect to be there to receive them: *Wilson Sewing Machine Co. v. Louisville etc. R. R. Co.*, 71 Mo. 203. But delivery to a person named on written authority to do so from the consignee, even though he states that he has no claim on the goods, is sufficient against the consignor: *Dobbin v. Michigan Central R. R. Co.*, 56 Mich. 522.

Delivery upon Production of Bill of Lading. — Although delivery to the consignee or his authorized agent ordinarily discharges the carrier, if made without notice of right in another, yet due regard must always be had to the obligations to which bills of lading give rise. The bill of lading is, in general, assignable by the consignee, and sometimes by the consignor, so as to render the carrier liable to make delivery to the assignee; and it is therefore held to be no unreasonable regulation to require its production as a condition of delivery, even to the consignee: *Boss v. Glover*, 63 Ga. 746; and see *The Thames*, 14 Wall. 98. And it is stated to be the duty of the carrier to ascertain whether a bill of lading was delivered to the shipper, and if so, to retain the property until demanded by one claiming under that title, and to deliver in accordance therewith: *City Bank v. Railroad Co.*, 44 N. Y. 136; *Furman v. Union Pacific R. R. Co.*, 106 Id. 579; *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24; 4 Am. St. Rep. 626; *Dows v. Milwaukee Bank*, 91 U. S. 618; *Tindall v. Taylor*, 4 El. & B. 219. The bill of lading is the carrier's contract by which he agrees to deliver the goods intrusted to him for transportation to the person named therein or to his order; and if he delivers them to any one else, and loss ensues to the person entitled to receive the goods, he becomes liable. A *prima facie* case is made out against him, when it is once shown that he delivered the goods to one not holding the bill of lading, which can only be rebutted by showing that, although he made the delivery without the production of the bill of lading, yet he did in fact deliver to the very person who, according to its terms, was entitled to receive the goods: *National Bank of Chester v. Atlanta etc. R'y Co.*, 25 S. C. 216. In other words, if the carrier delivers the goods without the production of the bill of lading, he runs the risk of showing a delivery in accordance with its directions: *Furman v. Union Pacific R. R. Co.*, *supra*. And it seems that a carrier who receives goods from another carrier is not justified in a delivery to the wrong person without the production of a bill of lading, where one was made, although the delivery was in accordance with the papers received from the preceding carrier, in which a different consignee is named from the one named in the bill: *Id.* So where a carrier receives goods under a bill of lading containing instructions to deliver them at the end of its route "to the order" of the consignor "or his assigns," and it also contains marks and directions indicating a place beyond as their ultimate destination, and the carrier, without giving like instructions, forwards them to that place by intermediate carriers, the last of whom delivers them to the consignee without requiring him to produce the bill of lading, the carrier who receives the goods commits a breach of contract, and is liable for their value: *North v. Merchants' Transportation Co.*, 146 Mass. 315. And where, by the terms of the bill of lading, the goods are consigned to the order of the consignor, and the bill is indorsed in blank, and negotiated for the value as security for a draft drawn by the consignor on a third person, the carrier has no right to deliver the goods to such third person without the production of the bill of lading or authority from its holder: *Boatman's Savings Bank v. Western etc.*

R. R. Co., Sup. Ct. Ga., 1888. If the shipper attaches his bill of lading to a draft upon the consignee, it is an expression of his intention to deliver the goods upon payment of the draft, and to retain control of them until such payment; and if the carrier delivers them while in transit to the shipper, it incurs liability to the consignee who has duly taken up the draft: *Wells, Fargo, & Co. v. Oregon Railway etc. Co.*, 12 Saw. 519.

Usage as Affecting Delivery by Carrier. — It is well settled that custom or usage may frequently have great influence in determining what is sufficient delivery of goods by a common carrier: See *McMasters v. Pennsylvania R. R. Co.*, 69 Pa. St. 374; 8 Am. Rep. 264; but in order to be of avail to the carrier, the custom or usage must be well established and generally known: *Ostrander v. Brown*, 15 Johns. 39; 8 Am. Dec. 211, and note 217. And a carrier is not relieved from liability for delivering goods without requiring the production of the bill of lading or receipt, or other authority of the consignor, on the ground of a delivery in accordance with a course of dealing with the party to whom it is made, in the absence of proof that such course of dealing was brought home to the knowledge of the consignor in a way to justify a finding that he had acquiesced therein, and consented to the delivery in the particular instance accordingly: *Pennsylvania etc. R. R. Co. v. Stern*, 119 Pa. St. 24; 4 Am. St. Rep. 626; and see, to the same effect, *North Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727; *Bank of Commerce v. Bissell*, 72 N. Y. 615. And where the carrier offered to prove a custom to deliver property under bills of lading to the person who was to have notice of its arrival, and the evidence was rejected, it was held on appeal that there was no error in its rejection, since, if the custom were established, it could not subvert a positive, unambiguous contract: *Bank of Commerce v. Bissell*, 72 N. Y. 615.

Nature and Extent of Carrier's Liability for Delivery to a Wrong Person. — The undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the party designated by the terms of the shipment, or to his order, at the point of destination, and there are no conditions which would release him from this duty, except such as would also release him from the safe carriage of the goods: *North Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727. Indeed, no obligation of the carrier is more rigorously enforced than that which requires delivery to the right person; and the law will allow of no excuse for a wrong delivery, except the fault of the shipper himself: *Furman v. Union Pacific R. R. Co.*, 106 N. Y. 579; *American Express Co. v. Greenhalgh*, 80 Ill. 68; *The Drew*, Dist. Ct. N. Y., 1883. If the delivery be to a wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, the carrier will be responsible, and the wrongful delivery will be treated as a conversion: *Powell v. Myers*, 28 Wend. 290; *McEntee v. N. J. Steamboat Co.*, 45 N. Y. 34; 6 Am. Rep. 28; *Wernwag v. Philadelphia etc. R. R. Co.*, 117 Pa. St. 46; *Jeffersonville R. R. Co. v. White*, 6 Bush, 251; *Olaftin v. Boston etc. R. R. Co.*, 7 Allen, 341; *Merchants' Despatch etc. Co. v. Merriam*, 111 Ind. 5, 8. And if the carrier allows an officer to take the goods he is carrying, it is no defense to an action of trover against him for their value to show that an officer took them, without also showing that he had a legal right to take them by virtue of his writ: *Kiff v. Old Colony etc. R. R. Co.*, 117 Mass. 591; 19 Am. Rep. 429; *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301. If a misdelivery is caused by the goods being wrongly marked by the agent of the carrier, the carrier is liable: *Meyer v. Chicago etc. R. R. Co.*, 24 Wis. 157; 1 Am. Rep. 164; but if the goods are lost because not properly marked by

the owner, he must impute this to his own fault, and the carrier is not liable: *The Huntress*, 2 Ware, 89; *Meyer v. Chicago etc. R. R. Co.*, 24 Wis. 157; 1 Am. Rep. 164. If the carrier has carried out the directions of the sender, the mere fact that he has delivered the goods to some person to whom the sender did not intend the delivery to be made is not sufficient to support the allegation that he has converted them: *McKeon v. McIvor*, L. R. 6 Ex. 36. The true rule is, that while carriers are answerable for frauds upon themselves, they are not insurers against frauds upon the consignor, of which they had no knowledge or grounds of suspicion. The carrier is not the guardian of his patrons, nor, when faultless himself, must he answer for their mistakes, or mend their misfortunes: *Wilson v. Adams Express Co.*, 27 Mo. App. 360; *The Drew*, Dist. Ct. N. Y., 1883. His contract is to make delivery of the goods according to the directions; and if a man sells goods to A, and by mistake directs them to B, the carrier's duty is performed if he delivers them to B, although the unexpressed intention of the forwarder was that they should be delivered to A: *Samuel v. Cheney*, 135 Mass. 278; 46 Am. Rep. 467; *Dunbar v. Boston etc. R. R. Co.*, 110 Mass. 26; or if two men of the same name live in the same town, and one of them orders goods from a merchant at a distance, and the carrier delivers the goods to the man of that name who had really made the order, the carrier is not to be held responsible simply because the consignor thought his order was from the other of the two men: *Wilson v. Adams Express Co.*, 27 Mo. App. 360. But if a purchaser has personated some fictitious person to whom the goods were addressed, and the carrier delivers the goods to a stranger, without inquiry as to who or what he was, simply upon his asking for the goods, making no effort whatever to find out the consignee, or the identity or right of the stranger asking for them, this constitutes such negligence in delivery on the part of the carrier as will render him liable to the consignor for the value of the goods: *Price v. Oswego etc. R. R. Co.*, 50 N. Y. 213; 10 Am. Rep. 475; *Winslow v. Vermont etc. R. R. Co.*, 42 Vt. 700; 1 Am. Rep. 365; *Southern Express Co. v. Van Meter*, 17 Fla. 783; 35 Am. Rep. 107; *Houston etc. R. R. Co. v. Adams*, 49 Tex. 748; 30 Am. Rep. 116. In the case of a common carrier by teams, the fact that the consignor hands the driver of the team an envelope, containing a bill of the goods to be signed by the consignee, but upon the corner the wrong street is named, furnishes no excuse for delivering the goods to the wrong person: *McCulloch v. McDonald*, 91 Ind. 240.

FORMER ADJUDICATION. — JUDGMENT THAT ACTION BE DISMISSED WITHOUT PREJUDICE TO ANOTHER ACTION is no bar to subsequent action for same cause: *Gunn v. Peakes*, 36 Minn. 177; 1 Am. St. Rep. 661; but dismissal of former suit will be a technical bar to subsequent suit upon the same point or matter, where same plaintiff (or his representatives) appears against the same defendant (or his representatives): *Hunt v. Butterworth*, 21 Tex. 133; 73 Am. Dec. 213.

BILLS OF LADING. — CONSIGNEE'S POSSESSION OF BILL OF LADING GIVES HIM NO TITLE beyond a right to receive the goods from a carrier: *First National Bank etc. v. Ege*, 109 N. Y. 120; 4 Am. St. Rep. 431, and note 435; and compare *Adams v. O'Connor*, 100 Mass. 515; 1 Am. Rep. 137; *Murray v. Warner*, 55 N. H. 546; 20 Am. Rep. 227. As to negotiability of, see note to *Chandler v. Sprague*, 38 Am. Dec. 422, 423.

BOOT v. BREWSTER.

[75 IOWA, 631.]

HOMESTEAD, WHEN ACQUIRED, WILL BE PRESUMED TO CONTINUE until the contrary appears, the burden of proof in this respect being upon the general creditor.

PERMANENT ABANDONMENT OF HOMESTEAD SHOULD NOT BE INFERRED, when it appears that the claimant left the premises with his family for the purpose of earning a living; that some furniture was left in the house, and never removed by him; that the premises were so rented that the lessee was a tenant at will; that a homestead was not acquired elsewhere, and the claimant testified that he always intended to return. The long duration of his absence, though entitled to consideration, is not conclusive, under the circumstances, of the fact of abandonment.

HOMESTEAD — EVIDENCE. — WHEN JUDGMENT IS OBTAINED AGAINST DEBTOR WHILE IN OCCUPANCY OF HOMESTEAD, PROOF OF INTENT to abandon the homestead should be clearer and more satisfactory than when the lien relied on was obtained after the homestead had ceased to be actually occupied as such.

HOMESTEAD — VALUE. — IOWA CODE, SECTION 1996, LIMITS HOMESTEAD IN TOWN PLAT to one half acre, unless the value is less than five hundred dollars, but the claimant's own testimony that he offered to take four hundred and fifty dollars for the homestead in controversy, which was an acre in extent, and in a town plat, was held sufficient, in the absence of all other evidence, to establish such value.

MOTION FOR NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE IS PROPERLY OVERRULED where the affidavit simply states that the affiant was unable to find or procure the evidence prior to the trial. The facts constituting the diligence used in getting the evidence should be stated.

ACTION in equity to set aside an execution sale of premises claimed by the plaintiff as his homestead. The relief was granted, and the defendant appealed.

Wright, Baldwin, and Haldane, for the appellant.

Stone and Sims, for the appellee.

SEEVERS, C. J. 1. It clearly appears, from the evidence, that the plaintiff obtained title to the premises in controversy in 1880, and that he occupied the same as his homestead in November of that year, and so continued to occupy the same for the space of about three years thereafter. The defendant, Brewster, obtained, in 1882, a judgment against the plaintiff on an indebtedness contracted after the acquisition of the homestead. The material question, therefore, is, whether there has been an abandonment of such homestead. The plaintiff and his family left the premises in controversy, and resided for a time at Carson, and at Kansas City, from which he returned to Carson. He did not acquire another homestead,

but occupied rented property. While at Carson and Kansas City, he was engaged in business as a clerk, or some other capacity, in the employ of other persons. It clearly appears that he left his homestead for business purposes, and for the purpose of obtaining a support for himself and family. When he left the homestead he left therein some household and kitchen furniture, which has remained in the house, or at least has never been removed by the plaintiff. Such homestead has been rented and occupied by others, but it was so rented that the lessee thereof was a tenant at will. At least one person made application to the plaintiff to purchase the property, and the plaintiff named a price he would take for it. The plaintiff testified that he left the homestead for a temporary purpose, and always intended to return. While such evidence of an intention to return cannot be regarded as conclusive, yet it is admissible, and entitled to consideration; and when it appears, as it does in this case, that the homestead was left for the purpose of obtaining a support for the family, it seems to us that an intent to abandon permanently the homestead should not be inferred, but rather an intent to return should be, as such intent must, it seems to us, always exist when the removal when made was for a temporary business purpose. If a person cannot obtain a living and occupy his homestead, for the time being at least, he must of necessity temporarily abandon it, and such abandonment should not be regarded as permanent. A homestead, when acquired, will be presumed to continue until the contrary appears; the burden in this respect being on the general creditor: *First Nat. Bank of Davenport v. Baker*, 57 Iowa, 197; *Bradshaw v. Hurst*, 57 Id. 745; and the defendants, as we think, have failed to establish such fact. The length of time the plaintiff has been absent from the homestead is entitled to consideration, but is not conclusive: *Dunton v. Woodbury*, 24 Id. 74. And yet this is practically the only circumstance relied on by the defendants, for if the absence had been only for a few months, it is clear to our minds that the required abandonment could not be regarded as established. On the other hand, there is the fact that no homestead has been acquired, and that it was left for a temporary business purpose, as is indicated by the fact that furniture was left in the house, which has never been removed. Besides this, the judgment under which the defendant claims was obtained during the time the premises were occupied as a homestead, and it has been held in that case that proof of

an intent to abandon the homestead should be clearer and more satisfactory than when the lien relied on was obtained after the homestead had ceased to be actually occupied as such: *Davis v. Kelley*, 14 Iowa, 523. No two cases are exactly alike, and no general rule can be established, but we think the facts in this case bring it within the rule established in *Fyffe v. Beers*, 18 Id. 4; 85 Am. Dec. 577; and *Shirland v. Union Nat. Bank of Massilon*, 65 Iowa, 96.

2. The evidence tends to show that the homestead is within a town plat, and consists of one acre of land; and therefore it is insisted that as to the excess of over one half an acre it cannot be exempt, for the reason that it is limited by section 1996 of the code to that quantity, unless the value is less than five hundred dollars. And it is contended that the burden is on the plaintiff to show such value, which we think is true. It is further contended that he has failed to establish such fact; but we think it sufficiently appears that the value of the homestead is less than \$500, for the reason that when the plaintiff was asked what he would sell it for, he said \$450. In the absence of any other evidence, this, under the circumstances, sufficiently establishes such value.

3. The defendants filed a motion for a new trial on the ground of newly discovered evidence, which we think was properly overruled, for the reason that it does not sufficiently appear that the evidence could not have been obtained at the trial if due and proper diligence had been exercised. The affidavit on which a new trial was asked fails to state what, if any, diligence was used. It simply states, in substance, that the affiant was unable to find or procure the evidence prior to the trial. This is clearly insufficient. The efforts made in this direction, at least to some extent, should be stated.

Affirmed.

HOMESTEADS — TEMPORARY REMOVAL FROM HOMESTEAD DOES NOT OPERATE AS AN ABANDONMENT: *McDermott v. Kernan*, 72 Wis. 268; 7 Am. St. Rep. 864, and note 866. In Massachusetts, homestead rights cannot be lost by abandonment until a new homestead is acquired elsewhere: *Woodbury v. Luddy*, 14 Allen, 1; 92 Am. Dec. 731. If an old homestead is lost without proof of a new homestead being gained, the circumstances showing abandonment must be most clear and decisive: *Shepherd v. Cassidy*, 20 Tex. 24; 70 Am. Dec. 372.

HOMESTEAD. — RESIDENCE ONCE ACQUIRED AND ESTABLISHED IN GOOD FAITH draws around it protection of the homestead law; and a temporary absence in search of health, or residence in another place for the purpose of

business, will not deprive the homestead claimant of his right, without clear proof of a permanent abandonment on his part: *Tumlinson v. Swinney*, 22 Ark. 400; 76 Am. Dec. 432; *Franklin v. Coffee*, 18 Tex. 413; 70 Am. Dec. 292; *Guio*d v. *Guio*d, 14 Cal. 506; 76 Am. Dec. 441; *Fyffe v. Beera*, 18 Iowa, 4; 85 Am. Dec. 577. Renting homestead during temporary absence for business or pleasure does not work an abandonment of it: *Pryor v. Stone*, 19 Tex. 371; 70 Am. Dec. 341; *Tumlinson v. Swinney*, 22 Ark. 400; 76 Am. Dec. 432.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — A NEW TRIAL WILL NOT BE GRANTED to enable one to obtain evidence which ordinary diligence could have procured on the trial, if so desired, and especially if such evidence is merely cumulative: *Fears v. Albee*, 69 Tex. 437; 5 Am. St. Rep. 78, and note 85.

HOSIC v. CHICAGO, ROCK ISLAND, AND PACIFIC RAILWAY COMPANY:

[75 IOWA, 682.]

RAILROAD COMPANIES — LIABILITY FOR DEFECTIVE APPLIANCES — CUSTOM. — In an action by a brakeman, who was in the employ of a railroad company, brought to recover damages against the company for injuries sustained by falling from an open car loaded with machinery, over which he had to pass, a finding by the jury that the defendant was negligent in not providing a foot-board over such car for the use of brakemen is justified; and this being true, the fact that such negligence was usual or customary would not relieve the defendant from liability for its consequences.

MASTER AND SERVANT — ASSUMPTION OF RISK BY SERVANT. — A person who accepts service as brakeman on a railroad, knowing that the company was not accustomed to provide foot-boards over open cars loaded with machinery, it not being shown, however, to be usual to place such cars where the brakemen were required to pass over them, cannot be said to assume the risk.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE. — A brakeman on a railway train who, knowing the danger, attempts to pass over an open car loaded with machinery, and not provided with a foot-board, and who falls and is injured, cannot, as a matter of law, be said to be guilty of contributory negligence in going upon the car, but the question is one for the jury, depending upon all the circumstances of the case.

ACTION to recover for personal injuries alleged to have been caused by the negligence of the defendant. Judgment was rendered on a verdict for the plaintiff, and the defendant appealed.

Thomas S. Wright, and Lafferty and Johnson, for the appellant.

John F. Lacey, for the appellee.

ROBINSON, J. On the twenty-third day of November, 1883, plaintiff was in the employ of defendant as head brakeman on

a freight train. He was about eighteen years of age, had been in the service of the defendant for two months preceding the date named, and had acted as brakeman at different times for a year. At 12:45 o'clock in the morning of the day named, the train on which plaintiff was employed left Rock Island on its run through Sigourney to Oskaloosa. The train contained a platform-car, loaded with plows and other farming implements, which, at the time in question, was the second car from the engine. This car was not provided with a foot-board, and could be passed over only by stepping on the implements with which it was loaded. As the train approached Sigourney, the plaintiff attempted to pass over this car to set a brake, and in so doing fell to the ground in such a manner that several car-wheels passed over his right arm, crushing it, and causing it to be amputated above the elbow. Plaintiff contends that his fall was due to the negligence of defendant in not providing the car in question with a suitable passageway over its load.

1. It is claimed by appellant that the car from which plaintiff fell was loaded in the manner usual on its road, and that it was not customary at that time, and never had been, to place foot-boards over cars so loaded; that plaintiff knew these facts before he was employed by defendant; and that, by accepting service with that knowledge, he assumed all risks and hazards growing out of the manner of loading such cars without foot-boards. We understand that foot-boards, otherwise known as "running-boards," are placed lengthwise of the car, and above their loads, in such manner as to afford a convenient way for the use of brakemen in passing from one part of the train to another. Under the charge of the court, the jury must have found that defendant was negligent in not providing a foot-board for the car in question. This being true, the fact that such negligence was usual or customary would not relieve defendant from liability for its consequences: *Hamilton v. Des Moines Valley R'y Co.*, 36 Iowa, 38. But we do not think the jury would have been justified in finding from the evidence that plaintiff assumed the risk alleged by defendant. It is true that it was common for defendant to haul cars of agricultural implements which were not provided with foot-boards, but it was not shown to be usual to place such cars where the brakemen were required to pass over them in the discharge of their duties. On the contrary, the jury might well have found, from the evidence, that it was

usual to place them near the middle of the train. As to whether it was the rule of the defendant to provide cars like that in controversy with foot-boards, the evidence was conflicting, but the jury were justified in finding that it was negligence not to provide them.

2. Appellant insists that if appellee knew, before going onto the car from which he fell that an attempt to pass over it would be dangerous, then he was negligent in making the attempt, and should not be permitted to recover in this action, for the reason that his own wrong contributed to the injury of which he complains. It is even suggested that plaintiff should have refused to go out with his train because it contained the car in question. Whether plaintiff was negligent in attempting to pass over the car does not depend entirely upon his knowledge of the danger involved, but rather upon all the circumstances of the case. It was not the duty of the plaintiff to refuse to go out with his train. When this left Rock Island, it was dark, and it is not shown that he knew there were no passage-way over the car in question until the moment of his going onto it at the time of the accident. We think the evidence shows that at that time he must have known the condition of the car, and is chargeable with knowledge that an attempt to pass over it would be dangerous. Will that fact defeat his recovery? Appellant insists that it will, and cites numerous decisions of this court in support of its position. But none of those decisions involve the principle of this case. In *Kroy v. Chicago etc. R'y Co.*, 32 Iowa, 358, the brakeman had attempted to uncouple a train while in motion. The attempt was not only dangerous, but was made without orders. It was not in the line of his duty, and was not sanctioned by any one having authority to direct the act to be done, and it was properly held that there could be no recovery for his death, which resulted from the unauthorized attempt.

In *Muldowney v. Illinois Central R'y Co.*, 39 Iowa, 616, the plaintiff's intestate voluntarily undertook to make a coupling while the cars were in motion. He was warned by some of the train-men not to make the attempt, as it was dangerous. He could see that the warning was well founded, but persisted in the attempt, and was injured. It was not his duty to make the coupling at the time and in the manner attempted. Other cases cited by appellant involve the principle, that where an employee sustains an injury in consequence of defective railway appliances or appurtenances of which he had due notice,

and where the injury results from an act of the injured person which he might have avoided, or which he was under no obligation to perform in the manner which led to the injury, then he cannot recover. But these cases have no application to this case. When the train approached Sigourney, plaintiff was riding on the engine. At the proper time for setting the brakes, he went onto the car next to the engine, and attempted to set a brake, but found it would not work. In order to reach a brake that could be used, it was necessary for him to pass over the car in question. Appellant insists that it was not necessary for him to set a brake; that the conductor had told him, a short time before, that he need not go on top of the train; that the train contained but few cars, and could be controlled with the brakes at the rear end; and that it was in fact so controlled. It is not claimed that plaintiff was ordered not to take his usual and proper station, and it is shown that this was at the forward end of the train. His duties included the setting of brakes at that end when required. He was at his proper station when the train approached Sigourney, and claims that it was then running at a higher rate of speed than was usual in approaching stations, and that the engineer gave the signal for brakes. This is disputed by appellant, but there was no evidence tending to support the claim, and it was for the jury to determine the truth of the matter.

It appears that it was not usual for the engineer to whistle for brakes when approaching a station, and that when he did, it indicated that something was wrong with the track; that the train was going in too fast; that the brakemen were not doing their duty, or something else which called for prompt action. The jury were told by the court that, in passing upon the question as to whether plaintiff was guilty of negligence contributing to his injury, they should consider, among other things, whether or not a signal for brakes was given, "and whether there was any necessity for setting the brakes on the forward end of the train." If the signal for brakes was given, or if plaintiff had good reason to believe the brakes should be set on his end of the train, what should he have done when he discovered that the brake on the first car would not work? Appellant seems to claim that he should have done nothing, for the reason that he could only set a brake by passing over the car in question, and that he could only do that by taking a dangerous risk. This does not appear to us to be a correct view of the case. The efficiency of the railway service, and

the due protection of life and property, require prompt obedience to orders and prompt discharge of duties on the part of employees. And this is especially true in regard to the management of trains while in motion. It would not do to make the subordinate judge of the propriety of obeying an order, or to decide as to the necessity of discharging a duty. In this case, it was the duty of plaintiff to obey the signal, if one was given. If none was given, yet if, under the rules of the road, brakes should have been set on his end of the train, he was required to make due effort to set them, even though danger to himself was involved in the attempt. He was not responsible for the absence of the running-board, nor for the place the car occupied in the train. There was neither time nor opportunity to protest against passing over it. It is not claimed that he was negligent while on the car, but that he was in fault in going onto it. We do not think the fact that plaintiff attempted to pass over the car with knowledge of its condition ought to defeat his recovery. Whether he was negligent in fact was a question properly submitted to the jury. They found that he was not; and we are not disposed to disturb their verdict.

3. Appellant objects to various portions of the charge to the jury, and to the action of the court in refusing to give certain instructions asked by defendant. It is not necessary to consider these objections in detail. It is sufficient to say, in addition to what we have already said, that we discover no prejudicial error in any of the matters of which complaint is made.

Affirmed.

RAILWAYS. — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE, when a question of fact for jury, and when a question of law for the court: See note to *Mynning v. Detroit etc. R. R. Co.*, 8 Am. St. Rep. 804; note to *Baltimore etc. R. R. Co. v. Kane*, ante, p. 387; note to *Stephens v. Hannibal etc. R'y Co.*, ante, p. 343.

MASTER AND SERVANT — ASSUMPTION OF RISKS BY A SERVANT. — In the absence of testimony showing the proper notice given by the agent in charge, or knowledge on the part of the servant of the perils and risks, ordinary and extraordinary, incident to the employment, contributory negligence cannot be charged to the servant in case of an injury; nor can the servant in such case be said to have assumed all such risks and perils: *Smith v. Peninsular Car Works*, 60 Mich. 501.

CONTRIBUTORY NEGLIGENCE. — INSTANCES OF WHAT IS AND WHAT IS NOT CONTRIBUTORY NEGLIGENCE: See note to *Harris v. Township etc.*, 64 Mich. 447; 8 Am. St. Rep. 842. As to what contributory negligence does not bar recovery, see note to *Harris v. Township etc.*, 8 Am. St. Rep. 849-851.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

REYNOLDS v. SUMNER.

[126 ILLINOIS, 58.]

ENTRIES IN BANK-BOOKS CONCERNING DISCOUNT AND RENEWAL OF NOTE ARE ADMISSIBLE in evidence, after proof of their genuineness and of the death of the person who made them, for the purpose of showing the relations of the parties thereto to the transaction in respect to which the note was given.

RESULTING TRUST, WHEN ARISES.—Where a person enters public lands with land warrants owned by himself and another, and takes the legal title in his own name, a resulting trust is thereby created in the lands in favor of such other, in proportion to his interest in the warrants, without regard to any express contract between them. But if there is a contract between them, it may be looked to as affording evidence of the relation between them and the character of the transaction.

STATUTE OF FRAUDS DOES NOT APPLY TO RESULTING TRUST. The transaction and acts of the parties from which such trust results may be shown by parol as well as by written evidence.

RESULTING TRUSTS ARE DISTINGUISHED FROM EXPRESS TRUSTS in the manner of their creation.

LACHES OR STATUTE OF LIMITATIONS MAY CONSTITUTE BAR TO SUIT TO ENFORCE RESULTING TRUST. But while the defense of laches may be available in cases of resulting and implied trusts, yet within what time the bar will be held complete must depend upon the circumstances of the particular case. Lapse of time is only one of many circumstances from which the conclusion of laches must be drawn.

ORDINARILY, COURTS OF EQUITY ADOPT TIME FIXED BY STATUTE OF LIMITATIONS for barring claims at law in analogous cases as the period at the end of which they will conclude a recovery in equity. But this rule is not inflexible, and its application will always depend upon a consideration of the allegations and proof whether the presumption from which the bar arises prevails. The presumption arising from the mere lapse of time may be repelled by proof of other facts and circumstances inconsistent with it.

TRUSTEE'S POSSESSION TAKEN UNDER TRUST DOES NOT BECOME ADVERSE until the trust is openly disavowed or denied, and knowledge of this fact is brought home to the *cestui que trust*.

LACHES CANNOT BE IMPUTED TO CESTUI QUE TRUST so long as his rights are acknowledged by his trustee. Until the trust is repudiated, he has a right to rely upon the integrity and faithfulness of his trustee, without forfeiting his rights.

BILL in equity. The opinion states the case.

Kay and Evans, McDonald, Butler, and Mason, S. P. Baird, and J. B. Sherwood, for the appellants.

Doyle, Morrison, and Pearson, R. P. and J. C. Davidson, and Coffrath and Stuart, for the appellees.

SHOPE, J. This is a bill to establish and enforce a trust in favor of appellants. On December 31, 1852, William F. Reynolds, under whom appellants claim, entered into a written agreement with Edward C. Sumner, under whom appellees claim, respecting the purchase of land warrants and the entry of public lands therewith. Under this agreement, Reynolds was to furnish Sumner with warrants calling for four thousand acres of land, and the latter was to enter the land with such warrants in the joint names of Reynolds and Sumner, and after the expiration of one year, Sumner was to refund to Reynolds one half of the cost of the land, including expenses, but without interest thereon. At the time this agreement was entered into, Sumner gave Reynolds his promissory note for two thousand dollars, which was supposed to be about one half of the cost and expenses of the land warrants and of the entry of the land, and it was also agreed that if this note was discounted or used by Reynolds, he was to protect the same for one year, by renewal or otherwise, when it was to be paid by Sumner, or so much thereof as would be equal to one half of the cost of said lands, without interest.

There can be no question as to the giving of a note of two thousand dollars by Sumner to Reynolds, which matured in less than one year after its date, and that it was given for part of the purchase price of land warrants the latter had agreed to procure and furnish the former. This is apparent from the written agreement of the parties referred to. It appears, also, from entries in the books of the Branch Bank of Indiana, that this note was discounted in favor of Reynolds, and was afterwards renewed when due, whereby the time of payment was extended one year, as provided in the written agreement.

On February 1 and 2, 1853, Sumner located twenty-four land warrants, each of one hundred and sixty acres, and shortly afterward another for a like number of acres, making in all four thousand acres of land, in his own name, and which is the land involved in this controversy. The making of the written agreement of December 31, 1852, and the entry of the land, are not disputed, but it is denied that Reynolds furnished the twenty-five land warrants with which the entry was made.

Appellants contend that Reynolds, on the day of the date of the written agreement, wrote to Gibson, Stockwell, & Co., commission merchants of New York City, asking for twenty-five land warrants of one hundred and sixty acres each, and promising to send a draft for the cost, etc., and that on January 10, 1853, he sent a letter to that firm, inclosing a draft for \$4,823.38, in which he stated that the draft was for the purpose of paying for the twenty-five land warrants ordered December 31, 1852, and that this firm, on January 15, 1853, sent by letter to Reynolds twenty-five land warrants, as ordered, which he delivered to Sumner to make the entry upon said land, and that they were so used. For the purpose of proving these facts, and as tending to show that the land warrants used by Sumner in the entry of these lands were furnished by Reynolds, and also that Sumner's note of two thousand dollars was given, renewed, and finally paid by the latter in part performance of the written agreement, the appellants produced in evidence the letters of said commission merchants to Reynolds, and sworn copies of the entries in their books and the books of the Branch Bank of Indiana, each of which was objected to as hearsay, and incompetent.

In the view we take of the case, it is not necessary to determine whether these letters were competent evidence or not. We think, however, that the entries in the bank-books, and the notices given by the cashier to Reynolds respecting Sumner's note, after having been proved and identified as genuine, and proof of the death of the person making the same, were admissible in evidence. The entries made by the bank officers at the time of the discounting and renewing of Sumner's note were a part of the *res gestæ*, and being made by persons having no interest in the subject in litigation, since deceased, are competent evidence. But if they are not competent, the frequent statements and declarations of Sumner as to Reynolds's interest in the land afford sufficient evidence, when

considered in connection with the written agreement and the undisputed facts, that Reynolds did furnish the land warrants with which to make the entry of the land, as he had agreed. His statements and admissions to the witnesses, Slaughter, Vennum, Evans, Brown, Stephens, O'Ferrall, Hitt, and others, and his letters to Reynolds in 1861 and 1865, asking for money with which to pay taxes on the land, show clearly that Sumner then regarded Reynolds as the equitable owner of one half of these lands; and this could only be so on the hypothesis that Reynolds owned one half of the consideration paid in acquiring the government title. When Sumner's note fell due, he wrote to Reynolds, of date August 17, 1853:—

"I received your letter day before yesterday,—I find it was the 9th. I have sent my bill back as soon as I could. I had forgotten all about it. E. C. SUMNER."

"N. B. You need not have sent me the bill; you might have put my name on it yourself."

This corresponds in date with the entries in the bank-books and the notices issued by the bank, and would seem to strongly corroborate the position of appellant. It is not shown there was any transaction, other than the renewal of Sumner's note, to which it could refer.

Appellees introduced no evidence tending to show how Sumner came into possession of the land warrants used by him in the entry of this land, or that he paid anything therefor, but as the warrants show an assignment on their face to Sumner, direct from the persons to whom they were issued, prior to the date of the written agreement, they contend that it will be presumed that Sumner acquired them directly from the assignors, and at these several dates of the assignments. This presumption might arise if the law did not recognize the assignment of such warrants in blank, and authorize the holder, before or at the time of making entries with them, to fill the blank with the name of the person making the entry. In addition to this, it is evident, from the written contract, that Sumner, on December 31, 1852, did not have these warrants. If he had, he would probably not have entered into an agreement with Reynolds to furnish them. The fact that on the first day of February, 1853, a month after the date of the written agreement, we find Sumner in possession of the precise amount in warrants agreed to be furnished by Reynolds, and used by him for the purpose indicated in such agreement,

and the further fact that Sumner paid his note, given for one half of the cost of the warrants, and his often-repeated admissions of Reynolds's interest in the land, afford very strong and convincing proof that Sumner obtained the land warrants under and in pursuance of his written contract with Reynolds.

The law is well settled, that if a party purchase land and pay the purchase price, taking the title in the name of a third person, a stranger to him, the grantee will take only the naked legal title, and the law will imply a resulting trust in favor of the party paying the consideration. And if a person having the money or means of another in his hands to invest for the owner, uses the same in the purchase of property in his own name, the law will hold him to be the trustee of the owner of the money or other consideration used in effecting the purchase. If two or more advance the price, and the title is taken in the name of one of them, a trust will result in favor of the other for an undivided share of the property, in proportion to his share of the purchase price paid: *Smith v. Smith*, 85 Ill. 189; *Mason v. Showalter*, 85 Id. 133; *Lofton v. Witboard*, 92 Id. 461. Therefore, if Sumner entered these public lands with land warrants owned by Reynolds, or by Reynolds and himself, and took the legal title in his own name, a resulting trust was thereby created in the lands entered in favor of Reynolds, in proportion to his interest in the land warrants, without regard to the express contract between them. The agreement was, that the title should be taken in the names of Reynolds and Sumner, jointly. This Sumner failed to do, but procured the same to be patented in his own name. The trust arises, not out of the contract, but because of the interest of Reynolds in the warrants with which the entry was made and the title to the lands secured. The contract, however, may be looked to as affording evidence of the relation between the parties and the character of the transaction. From it, we find that Reynolds was to furnish the land warrants with which to make the entry of the land; but he was to be only half-owner, — he crediting Sumner one year, without interest, with one half of the cost of the land. When, therefore, Sumner, having joint funds in his hands to be invested for the joint benefit of himself and Reynolds, invested the same in property in his individual name, a resulting trust arose in favor of Reynolds for the undivided half of the land acquired by the investment: See authorities *supra*; *Bush v. Stanley*, 122 Ill. 406; *Perry on Trusts*, 139.

The statute of frauds has no application to a trust thus created. The transaction and acts of the parties from which a trust results may be shown by parol evidence as well as by that which is written. Such trusts are distinguished from an express trust in the manner of their creation: *Perry on Trusts*, 137, 138; authorities *supra*; *Moffatt v. Shepard*, 2 Pinn. 66; *Lewis v. Lewis*, 9 Mo. 182; 43 Am. Dec. 540. It does not follow that if the title was taken in the name of Sumner, contrary to the provisions of the contract, a resulting trust was not thereby created, or that Sumner thereafter held in hostility to the equitable rights of Reynolds. The law will not presume an intention to defraud; but the conduct of Sumner will be referred to honest motives, in the absence of evidence showing why the title was taken in Sumner's name; nor will it be presumed, in view of the written agreement, that Reynolds intended to or did give his interest in this property to Sumner.

The statute of limitations, and the laches of Reynolds in his lifetime, are relied upon as a bar to the relief sought. Possession, to be a bar under the statute of limitations, must be open, notorious, and adverse to the party sought to be barred. The rule seems to be well settled, in cases of express trust, that mere delay will not defeat a recovery, unless the trustee has repudiated or disavowed the trust, and the disavowal is known to the *cestui que trust*. If, thereby, the claim of the trustee, in respect of the trust estate, is held adversely to the *cestui que trust*, the law of laches may become applicable: *Speidell v. Henrici*, 15 Fed. Rep. 753; *Brown v. County of Buena Vista*, 95 U. S. 160.

In respect of resulting or implied trusts, laches or the statute of limitations may constitute a bar to the action. Such trusts may be barred by the mere lapse of time. While the better doctrine is, that the defense of laches may be availing in cases of resulting and implied trusts, yet within what time the bar will be held to be complete must depend upon the circumstances of the particular case. Lapse of time is only one of many circumstances from which the conclusion of laches must be drawn, and each case must be determined in the light of the particular facts shown: *Boone v. Chiles*, 10 Pet. 177; *Michoud v. Girod*, 4 How. 503; *Baker v. Read*, 18 Beav. 398; *Carpenter v. Canal Co.*, 35 Ohio St. 307; *Prevost v. Gratz*, 6 Wheat. 481.

Ordinarily, courts of equity adopt the time fixed by statute

for barring claims at law in analogous cases as the period at the end of which they will conclude recovery in equity. This rule is by no means inflexible, and its application will always depend upon consideration of the allegations and proof whether the presumption from which the bar arises prevails. The presumption arising from the mere lapse of time may be repelled by proof of other facts and circumstances inconsistent with it. When possession of trust property is taken by the trustee under the trust, it is the possession of the *cestui que trust*, whether the trust be express or implied, and cannot be adverse until the trust is openly disavowed or denied, and this fact is brought home to the knowledge of the *cestui que trust*: *Thompson v. Finch*, 22 Beav. 325; *Shroter v. Smith*, 56 Ala. 208; *Chicago and Eastern Illinois R. R. Co. v. Hay*, 119 Ill. 493; *Oliver v. Piatt*, 3 How. 411.

We have already shown that the equitable right of Reynolds in these lands was repeatedly recognized by Sumner. The existence of the trust in this case was, so far as shown, never disputed or denied by Sumner in his lifetime. The relations between Sumner and Reynolds were apparently most friendly from the inception of the trust, which, as we have seen, was a continuing trust, until disavowed by Sumner, and the disavowal known to the *cestui que trust*. We think the facts shown establish that for many years the holding of Sumner, and his occupation and possession of these lands, were regarded by both Sumner and Reynolds as for himself and Reynolds. That the trust continued for the benefit of Reynolds is, we think, fairly inferable from the record: *Wood on Limitations*, 439; *Jones v. McDermott*, 114 Mass. 400; *Merriam v. Hassam*, 14 Allen, 516; 92 Am. Dec. 795; *Bacon v. Rives*, 106 U. S. 99; *Springer v. Springer*, 114 Ill. 550. So long as the equitable rights of Reynolds were acknowledged by Sumner, no laches could be imputed to him. So long as his trust and confidence were not abused, he might safely continue the same without forfeiting his rights. Until the trust was repudiated, he had a right to rely upon the integrity and faithfulness of his trustee. It was not until after the death of the trustee that the equities of Reynolds were denied, so far as shown in the proofs in this case, and the original bill herein was filed during his lifetime, and the supplemental bill shortly after his decease.

We think the circuit court erred in dismissing the bill. The decree of the circuit court is therefore reversed, and the cause

remanded to that court for further proceedings not inconsistent with this opinion.

DOCUMENTARY EVIDENCE — ACCOUNT-BOOKS — WHAT ARE SO AS TO BE ADMISSIBLE IN EVIDENCE: Note to *Miller v. Shay*, 1 Am. St. Rep. 451. A memorandum containing an entry of but a single transaction is not an account-book within the meaning of the law, and is not admissible in evidence, although the entry was made at the time of the transaction and in the presence of the parties: *Ryan v. Dunphy*, 4 Mont. 356; 47 Am. Rep. 355.

RESULTING TRUSTS. — CONSTRUCTIVE TRUSTS IN REALTY ARE EXCEPTED FROM THE OPERATION of the statute of frauds, and may be established by parol: *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189, and note; but such trusts, though they may be established by parol evidence, cannot be created by parol: Note to *Brison v. Brison*, 7 Am. St. Rep. 189. A resulting trust need not be in writing, but may be proved by parol: *Dryden v. Hanway*, 31 Md. 354; 100 Am. Dec. 61; even against the face of the deed or the answer of the trustee: *Irwin v. Ivers*, 7 Ind. 308; 63 Am. Dec. 420; notwithstanding the statute of frauds: *Osborne v. Endicott*, 6 Cal. 149; 65 Am. Dec. 498. Parol evidence is admissible to establish a resulting trust, but not to contradict a valid written contract: *Beck v. Beck*, 43 N. J. Eq. 39.

RESULTING TRUSTS — WHEN LANDS ARE BOUGHT BY AN AGENT AND TITLE TAKEN IN HIS OWN NAME, there is a resulting trust in favor of the principal: Note to *Brison v. Brison*, 7 Am. St. Rep. 197. As a general rule, resulting trusts arise in favor of one who advances money to another for the purchase of realty: *Sullivan v. McLenans*, 2 Iowa, 437; 65 Am. Dec. 780. Such trusts arise by mere operation of the law, and are not within the statute of frauds, and may be proved by parol: *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26; 79 Am. Dec. 673. Also, for instances of resulting trusts, see *Smith v. Strahan*, 16 Tex. 314; 67 Am. Dec. 622; *McGowan v. McGowan*, 14 Gray, 119; 74 Am. Dec. 668; *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291. A conveyance to a person may be overcome by proof of a resulting trust, by evidence showing that another than the grantee in the deed furnished and actually paid the purchase-money, but such evidence must be very clear, and received with great caution: *Corder v. Corder*, 124 Ill. 229. When property is bought by one for another, and is conveyed to the former, and is partly paid for by the latter, an implied trust results in favor of the payor to the extent of the money by him paid: *Smith v. Profitt*, 82 Va. 832. When realty is purchased and one party pays the purchase-money and another takes the title, a resulting trust arises in favor of him who pays the purchase-money, and the other holds the title only as his trustee: *Hellman v. Messmer*, 75 Cal. 166; but where a wife furnished one half the purchase price of a farm upon the understanding that the title should be taken in her name, but she was present when the conveyance was made directly to her husband, and knew that fact, and did not object, no trust resulted in her favor, though she may have believed that her husband held the title in trust for her: *Skinner v. James*, 69 Wis. 605. Where a firm obtained a certificate of membership in the board of trade, and the certificate was taken in the name of an agent of the firm in order that the agent might with greater facility transact the business of his firm, such agent is a trustee, merely holding the certificate in trust for his principal: *Ellsworth v. Ames Co.*, 125 Ill. 223.

LACHES. — EQUITY REFUSES AID AFTER THE LAPSE OF A CONSIDERABLE LENGTH OF TIME, where there has been a want of reasonable diligence:

Hudson v. Layton, 5 Harr. (Del.) 74; 48 Am. Dec. 167. Laches is a good defense in equity: *McCarter v. Traphagen*, 43 N. J. Eq. 323. Laches may apply in a case where, from the lapse of time, the death of parties, the destruction of the records, and the loss of papers, there can no longer be a safe determination of the matters in controversy: *Nelson v. Kounslar*, 79 Va. 468; *Perkins v. Lane*, 82 Id. 59. It is an inherent doctrine of courts of equity to refuse relief where there have been gross laches in prosecuting rights, or long, unreasonable acquiescence in the assertion of adverse claims. This policy is always firmly enforced, especially where the immediate parties to the transactions are dead: *Gibboney v. Kent*, 82 Id. 383. Equity assists the vigilant, but not those who slumber on their rights until their demands become stale, and the recollection of current events fades from the minds of those most familiar with them: *Mathias v. O'Neill*, 94 Mo. 520. After the commencement of an action for trespass, it was permitted to sleep for nearly four years, and was then noticed for trial, and shortly after defendant brought suit to restrain its further prosecution, the delay in bringing the latter suit was held not to be such laches as would defeat it: *Sherry v. Smith*, 72 Wis. 839. Though where a bond, averred to have been fraudulently procured, was executed in 1879, and the suit for relief against it was not instituted till 1885, whilst the bill gives no excuse for the delay, the plaintiff is precluded from relief by his laches: *Barnett v. Barnett*, 83 Va. 504.

LAPSE OF TIME IN EQUITY IS NO BAR TO RELIEF, when such relief is prevented by fraud, until after the discovery of the fraud: *Townsend v. Townsend*, 4 Cold. 70; 94 Am. Dec. 185. The statute of limitations does not begin to run in equity until the fraud is discovered, where fraud is involved: *Ferris v. Henderson*, 12 Pa. St. 49; 51 Am. Dec. 580. But a person is not guilty of laches, so as to deprive him of relief, by waiting three years after discovery of a mistake in an agreement before he brings action to correct the same: *Thompson v. Marshall*, 36 Ala. 504; 76 Am. Dec. 328. An action for relief on the ground of fraud may be commenced at any time within the statutory period, commencing after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which would lead, if pursued, to such discovery: *Hellmon v. Davis*, 24 Neb. 793; *Parker v. Kuhn*, 21 Id. 413.

STATUTE OF LIMITATIONS. — As a general rule, equity is governed by the operation of the statute of limitations: *Johnson v. Toulmin*, 18 Ala. 50; 52 Am. Dec. 212; *Hamilton v. Hamilton*, 18 Pa. St. 25; 55 Am. Dec. 585; *Smilie v. Biffle*, 2 Pa. St. 52; 44 Am. Dec. 156; *Tarleton v. Goldthwaite*, 23 Ala. 346; 58 Am. Dec. 296; *Haynie v. Hall*, 5 Humph. 290; 42 Am. Dec. 427; *Bank of Tennessee v. Hill*, 10 Humph. 176; 51 Am. Dec. 698; *Perkins v. Cartmell*, 4 Harr. (Del.) 207; 42 Am. Dec. 753; *Switzer v. Noffsinger*, 82 Va. 518; *Hutcherson v. Grubbs*, 80 Id. 251; *McCarty v. Ball*, 82 Id. 872.

ADVERSE POSSESSION. — Possession under an entry originally made in a fiduciary capacity, to become adverse, must be evidenced by some act or declaration to that effect: *Martin v. Jackson*, 27 Pa. St. 504; 67 Am. Dec. 489. Time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest which are fully and unequivocally made known to the *cestui que trust*: *Thomas v. Merry*, 113 Ind. 83. An administrator who purchases for himself, directly or indirectly, the land of his intestate, at his own sale, will, so long as he is not discharged from the administration, hold the land as trustee for the heirs, and cannot plead the statute of limitations against their suit for it: *Woodward*

v. *Joggers*, 48 Ark. 248. But where a trustee sold land, and conveyed it by a deed of record, believing that she had the right so to do, the rights of the *cotests que trust* were immediately affected, and it was their duty to take immediate action to protect their own rights; and the case does not come within the rule that the trustee of an express trust cannot acquire a right to the trust property by adverse holding for the period prescribed by the statute of limitations, unless his acts in that regard are so open and notorious as to take notice home to the beneficiary: *Stillwell v. Seavy*, 84 Ky. 372.

PAULSEN v. MANSKE.

[126 ILLINOIS, 72.]

MECHANIC'S LIEN ATTACHES TO WHAT ESTATE OR INTEREST IN LAND. —

In order that a mechanic's lien may attach, it is indispensable that the party with whom the contract is made shall have some estate or interest in the premises upon which the building is erected or the improvement made; but such estate may be the fee, or an estate for life or for years, or any interest, legal or equitable, in the land.

PARTY IN POSSESSION OF LAND UNDER CONTRACT OF PURCHASE IS OWNER

within the meaning of the mechanic's lien law, but only to the extent of the interest he owns; and it is to this interest that the mechanic's lien attaches. Where, therefore, the owner of a lot enters into an agreement with a builder, whereby the latter agrees to erect certain buildings on the lot, those on a certain part of the lot to cost a certain sum, in consideration of which the lot-owner is to convey the remainder of the lot to the builder, the owner agreeing to execute mortgages on the whole lot to enable the builder to make the improvements, the builder is to be considered a purchaser, and his interest will be subject to a mechanic's lien in favor of mechanics and material-men.

OWNER OF LAND WHO AUTHORIZES ANOTHER TO CONTRACT FOR ERECTION OF BUILDINGS thereon thereby makes his land liable to the lien of mechanics for labor done and materials furnished.

WHERE RELEASE OF MECHANIC'S LIEN IS GIVEN TO MORTGAGEE merely for the purpose of giving priority to the mortgage, the effect of the release will be confined to the purpose intended by the parties, and a stranger to it will not be permitted to avail himself of its benefits. And if such release names no person to whom it is made, and expresses no consideration, extrinsic facts may be looked to for the purpose of determining both the consideration and the party in whose favor it was intended to be made.

AGREEMENT TO ARBITRATE IS IMPLIEDLY REVOKED BY BRINGING SUIT to enforce a mechanic's lien for the claim in reference to which the agreement was made.

SUIT to enforce mechanic's lien. The opinion states the case.

Edward J. Judd and Eugene Clifford, for the appellant.

William Vocks and Harvey Storck, for the appellees.

SHOPE, J. It is insisted that the contract under which the labor was performed and material furnished for which the lien is sought to be established in this case was not made with the owner of the land, "and so no lien can exist in favor of the contractors." The first section of the act gives a lien to any person who shall, "by contract with the owner of any lot or piece of land, furnish labor or material," etc. The second section provides that such lien "shall extend to an estate in fee, for life, for years, or any other estate, or any right of redemption or other interest which the owner may have in the lot or land at the time of making the contract." Construing these two sections together, it becomes evident that by the words, "the owner of any lot or piece of land," as used in the first section, is meant the owner of any interest or estate in such lot or land. It is indispensable that the party with whom the contract is made shall have some estate or interest in the premises upon which the building is erected or improvement made; but such estate may be the fee, or an estate for life, or for years, or any interest, legal or equitable, in the land. This has been the uniform construction placed on the statute by this court. Under a similar statute (R. S. 1845, c. 65, secs. 1-17), it was held that a pre-emption right was an interest in land which could be subject to mechanic's lien: *Turney v. Saunders*, 4 Scam. 527. So, also, the possessory right and interest of the builder: *Steigleman v. McBride*, 17 Ill. 300; *Garrett v. Stevenson*, 3 Gilm. 261. Under the present statute, the party in possession under a contract of purchase "is to be considered owner only, in the sense of this statute, to the extent of the interest he owns, and that interest is what the mechanic's lien affects, and, as to these proceedings, that interest is to be considered as 'the land' on which the first and second sections give the mechanic's lien": *Tracy v. Rogers*, 69 Ill. 662; *Hickox v. Greenwood*, 94 Id. 266; *McCarty v. Carter*, 49 Id. 53; 95 Am. Dec. 572; *Judson v. Stephens*, 75 Ill. 255; *Henderson v. Connelly*, 123 Id. 98.

By reference to the agreements entered into by and between Paulsen and Lewis A. and Flora A. Brown, it will be seen that, by the first, the Browns covenanted to convey to Paulsen, by warranty deed, the west ninety-five feet of the lot in question,—being all of said lot except thirty-five feet off the east end,—and Paulsen, on his part, covenanted to pay for said ninety-five feet \$5,846, by building a row of buildings on said lots according to the second agreement. Both agree-

ments were executed at the same time, and are to be considered together. The second agreement provides that in consideration "of a contract for a deed," etc., in the first writing mentioned, Paulsen shall build a row of houses on said lot, making the house on the east thirty-five feet thereof, reserved by the Browns, a double house, with a barn, and costing \$5,846. It is then provided that the Browns shall execute notes, mortgages, and all such documents as may be necessary to borrow money on the lots with which to erect said buildings, all money, however, to be controlled by them, and all work and payment of contractors to be controlled by Paulsen. If the house and improvements put on the east thirty-five feet—the part reserved by the Browns—cost more than \$5,846, they were to assume of the mortgage debt an amount equal to such excess only. If the cost was less than that sum, Paulsen was to pay the difference to them. Paulsen was to derive all profits arising from the contract, except what might inure, if any, from the improvement of the east thirty-five feet. If we adopt the construction of this contract contended for by Paulsen, he would hold as purchaser, and his interest would, as we have seen, be subject to the mechanic's lien, and the purchaser at a sale thereof under such proceedings would take whatever interest, legal or equitable, he might have in the premises. That the decree was properly entered, as against the interest of Paulsen, cannot be questioned, unless the lien had been waived, as we shall see was not done as to him. The fact that Paulsen alone appeals to this court would, therefore, necessarily lead to an affirmance of the judgment of the appellate court, even if it were conceded that there was error in extending the lien to the interest of the Browns in said premises. If the lien existed as to Paulsen's interest, there would be no error of which he could be heard to complain.

But it is not necessary to put this case upon the grounds indicated. Upon examination, it will be found that the scheme contemplated the erection of a house for Mrs. Brown on the east thirty-five feet of the lot, for which, if built according to the plans agreed upon by the parties, she was willing to pay by conveying the residue of the lot to Paulsen. It may be difficult to define the exact legal relation existing between these parties, but it is evident that Paulsen was authorized and empowered by the Browns to erect the row of buildings upon the lot, and they were practically to furnish the money

by raising it on mortgage of the whole property, with which to build the same, — not only on the thirty-five feet reserved by them, but upon the ninety-five feet to be conveyed to Paulsen as well. It was understood that finally the Browns were to assume only so much of the mortgage as the house built for them should cost in excess of \$5,846. By the terms of the contract they retained control of the money, while the work and payment of contractors was to be under the control of Paulsen. The evidence shows that the money borrowed — twenty-two thousand dollars — was paid by checks payable to Flora A. Brown. The Browns amply protected themselves from loss by retaining title to all of the lot, and the control of the money used and to be used in the construction of said building. As we have seen, the profits arising from the value of the west ninety-five feet of the lot, after its improvement and the extinguishment of the mortgage, measured Paulsen's interest in the transaction. The Browns, having authorized the work to be done by Paulsen on their lot, cannot now compel the mechanics and material-men who have furnished labor and material in carrying out the plan agreed to and authorized by them, to look alone to Paulsen's interest in the land. It can make no difference that the contracts for labor and material were signed by Paulsen alone. He was, in fact, acting for and on behalf of the Browns, and they cannot be permitted to receive the benefit and escape the liability of the mechanic's lien attaching to their interest: *Story on Agency*, 476; *Whitlock v. Hicks*, 75 Ill. 460; *Lewis v. Rose*, 82 Id. 574; *Henderson v. Connelly*, 123 Id. 98.

In the case last cited, it was understood in the contract of purchase of the land that the purchaser should erect a house thereon, the vendors agreeing to advance the purchaser \$875 to assist him therein as the work progressed. Before the completion of the building the purchaser forfeited his contract of purchase, and the vendors re-entered, as they might lawfully do under their contract, and it was held that the vendors, having authorized and empowered the purchaser to enter into contracts for the erection of the buildings, had subjected their title in the property to the lien of the mechanics. The case at bar is much stronger than the case cited, and the principle there announced is decisive of the liability of the interest of the Browns in the property in controversy.

If any doubt could exist as to the capacity in which Paulsen was acting in contracting in respect of these buildings, it

is removed by the agreement between Paulsen and Mrs. Brown on the one part, and the builders on the other, in which the matters in difference between them were submitted to arbitration. In that agreement, Mrs. Brown admits, in the most ample manner, that in making said contracts with the builders, Paulsen acted for and on her behalf, as well as for himself. This evidence was introduced by the defendants below, and it does not lie in their mouth to complain of its consideration for all legitimate purposes.

It is next claimed that appellees waived and released their respective liens, and that the decree is therefore erroneous. It appears that prior to the seventeenth day of August, 1885, there had been drawn from the mortgage company fifteen thousand dollars of the twenty-two-thousand-dollar loan, secured by the mortgage before mentioned, leaving a balance of seven thousand dollars unexpended in the hands of the mortgage company. Differences having arisen between the lot-owners and appellees as to the amount due appellees under their contract, the mortgage company declined to pay the remaining seven thousand dollars unless they were assured of the priority of the mortgage over the mechanic's lien. On the last day named, the parties entered into an agreement, in writing, in which other lien-holders joined, to submit the difference to arbitration, in which the lien of appellees is expressly recognized, but appellees therein expressly "consented that so far as their claims for mechanics' liens against said premises are concerned, the United States Mortgage Company has a lien prior and superior to theirs, by virtue of a mortgage," the date and amount whereof are given. Paulsen and Brown, on their part, covenanted that, pending the arbitration, they would not sell or further encumber said premises, or in any manner change the condition of the title. These articles of submission were presented to the agent of the mortgage company, and payment of the remaining seven thousand dollars requested, but the agent was not satisfied, and refused to pay over the same unless a release was executed by the lien-holders. Accordingly, on the twenty-sixth day of August, the instrument relied upon as a release was drawn, signed by appellees and others, and the remaining seven thousand dollars of the loan paid by the mortgage company. The instrument of the 26th of August names no one to whom the release is made, and expresses no consideration, and we are justified in looking to the extrinsic facts to determine both

the consideration and the party in whose favor the waiver or release was intended. Thus looking, it is apparent that the only reason or consideration for the execution of this paper was to obtain the consent of the mortgage company to pay over to Paulsen and Mrs. Brown the sum of money remaining in their hands. Nothing is shown to change the relation of the parties after the execution of the submission to arbitration, and it is manifest that there was no intention to do more than give priority to the mortgage. As said by the appellate court: "The legal conclusion from these circumstances is, that the mortgage company, and that company alone, was the party in whose favor the release was intended to be executed. That seems to us to be as clearly shown as though the name of the mortgage company had been inserted in the instrument as releasee. The release given to the mortgage company is available for that company alone. It is not executed to Mrs. Brown or to Paulsen, or upon any consideration moving from them. So far as appears, they are mere strangers to the instrument, and we know of no principle upon which they can be permitted to avail themselves of its benefits."

Nor is the lien of appellees affected by the submission to arbitration, as contended by appellant. While it might be shown, perhaps, that the making of an award was defeated by appellant's refusal to select an arbitrator to take the place of one chosen but unable to serve, it is sufficient to say that no award was made, and until an award was made, the authority of the arbitrators was subject to revocation by either party to the submission: *Morse on Arbitration*, 230, and cases cited. It was not known that Mr. Dryer, one of the arbitrators named, would ever be able to act, and appellees were not bound to allow the statute of limitations to run against their lien because of his inability to perform the duty, or because appellant refused to agree to the substitution of another arbitrator. The institution of the mechanic's lien proceedings was, by implication, a revocation of the agreement to arbitrate: *Morse on Arbitration*, 236.

No question is made as to the amount found by the court to be due the several lienors, and we are unable to perceive any such error in this record as will authorize a reversal, and the judgment of the appellate court will be affirmed.

MECHANICS' LIENS. — THE LIEN ATTACHES TO WHAT ESTATE: *Lyon v. McGuffy*, 4 Pa. St. 126; 45 Am. Dec. 675, and extended note 678-680; note to *Loonie v. Hogan*, 61 Am. Dec. 697; *Smith Bridge Co. v. Bowman*, 41 Ohio

St. 37; 52 Am. Rep. 67; *Graham v. Mt. Sterling Coal Road Co.*, 14 Bush, 425; 2 Am. Rep. 412; *Tuttle v. Howe*, 14 Minn. 145; 100 Am. Dec. 205, and note 211, with cases there collected; *Galbreath v. Davidson*, 25 Ark. 490; 99 Am. Dec. 233, and note 236; *Brown v. Wyman*, 56 Iowa, 452; 41 Am. Rep. 117; *Neilson v. Iowa etc. R. R. Co.*, 21 Iowa, 184; 33 Am. Rep. 124; *Strycker v. Cassidy*, 76 N. Y. 50; 32 Am. Rep. 262, and note 264; *Drew v. Mason*, 81 Ill. 498; 25 Am. Rep. 288; *Pennsylvania etc. R. R. Co. v. Leuffer*, 84 Pa. St. 168; 24 Am. Rep. 189; *La Crosse etc. R. R. Co. v. Vanderpool*, 11 Wis. 119; 78 Am. Dec. 691, and note 694. But a mechanic's lien cannot be acquired against the property of an infant, because an infant cannot make a valid contract, and a lien implies one: *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418. A mechanic's lien for repairing a sidewalk is not enforceable against the adjacent lot under the code of Iowa: *Coenen v. Staub*, 74 Iowa, 32; 7 Am. St. Rep. 470, and note 471; compare, also, the Minnesota case, *Pratt v. Duncan*, 36 Minn. 545; 1 Am. St. Rep. 697. The lien of a mechanic will attach, although the owner of the lots upon which the houses are built has only an equitable interest; and where houses are erected for a person who, after the work has begun, changes his interest from that of owner in fee-simple to a leasehold interest, a mechanic may elect to file his claim, and maintain a lien against the lesser interest: *Goldheim v. Clark & Co.*, 68 Md. 498. A woman cannot defeat a mechanic's lien by setting up that she was a married woman at the time the improvements were made on her lot, and that they were made by order of her husband, and without her consent in writing: *Neeley v. Searight*, 113 Ind. 316. Where the plaintiff furnished materials for a building, erected by defendants on a certain village lot, in pursuance of a contract with them jointly made by them with him, and the title was then in a third party, and shortly prior to the completion of the building one of the defendants transferred his interest to the others, and the title to the lot was afterwards conveyed to them also, the plaintiff was entitled to his lien against the building and lot, and the defendants were estopped from denying ownership and title therein: *Colman v. Goodnow*, 36 Minn. 9. In the construction of a building for a hotel, everything of a permanent character which will pass as a part of the freehold, and which is reasonably necessary to equip it for hotel purposes, is such a part of the building as comes within the mechanic's lien law of Pennsylvania of 1836: *Dimmick v. Cook Co.*, 115 Pa. St. 573. To entitle a mechanic to a lien upon the general estate of a married woman for improvements made by him thereon, he must allege and show that the improvements were necessary for the comfort of the married woman and her family: *Roberts v. Riggs*, 84 Ky. 251. Mechanics' liens under the statute are specific, and they extend only to the particular building, structure, or erection whereon the materials were used or the labor performed; and a fence and the house inclosed by it are separate structures, and liens claimed against them must be for materials used in or work done upon each respectively: *Kezartee v. Marks*, 15 Or. 529. A mechanic's lien attaches only to the estate of the person for whom the building is erected, and where the materials are furnished for the owner of an equitable estate only, and a claim is filed against the owner of the legal title, it cannot be sustained without evidence that the defendant owns also the interest of the person for whom the building was erected: *Weaver v. Shuler*, 118 Pa. St. 634. When the title to the house and the title to the land are in different persons, and the notice specifies the name of the owner of the building, but not the land-owner, the lien will attach to the building, but not to the land: *Kezartee v. Marks*, 15 Or. 529. A homestead is not exempt from a

mechanic's lien for the value of lumber furnished to improve it: *Anderson v. Seamans*, 49 Ark. 475.

ARBITRATION. — SUBMISSIONS TO ARBITRATION ARE REVOCABLE IN THEIR nature, and the parties cannot make that irrevocable which is of its own nature revocable: *People v. Nash*, 111 N. Y. 310; 7 Am. St. Rep. 747, and note 751.

WABASH, ST. LOUIS, AND PACIFIC RAILWAY COMPANY v. McDOUGALL.

[128 ILLINOIS, 111.]

LIMITATION OF ATTORNEY'S POWER TO BIND HIS CLIENT BY STIPULATION.

— An attorney employed by a railway company in proceedings to condemn land for a right of way has no power to bind the company by his stipulation or agreement as to the plan of constructing the road, where no special authority has been given him to do so.

EVIDENCE ON QUESTION NOT IN ISSUE INADMISSIBLE. — Where a railway company, after changing the construction of its road from an embankment to a trestle-bridge, files its petition for a second condemnation of land, without averring therein any intended change in the construction, evidence that the opening in the embankment was not intended to be and remain permanent is inadmissible, and should be excluded. To render such evidence admissible, the company should have averred in its petition that it proposed to readopt the original plan of construction, and supported such averment by introducing plans to be incorporated into the record.

EVIDENCE OF INJURY TO PROPERTY, WHEN INADMISSIBLE IN CONDEMNATION PROCEEDINGS. — In a proceeding for the assessment of damages to land damaged, but not taken, by a change in the construction of a railroad by the erection of a bridge over an opening in an embankment, which had been made by a flood, evidence that by reason of such opening a house of the defendant was carried off by the water, and a levee built by him was destroyed, is calculated to lead the jury to believe that such injuries were proper elements of damages to be considered by them in framing their verdict, and should therefore be excluded. If the sole object of introducing such evidence is to illustrate the force with which the water passed through the opening, it should be so limited when offered.

PARTY CANNOT COMPLAIN OF IMPROPER EXCLUSION OF EVIDENCE where, after it is excluded, the objection is withdrawn, and there is nothing in the record to show that it could not have been introduced as well after the objection to it was withdrawn as when it was first offered.

LAND-OWNER HAS, WITHOUT CONTRACT, NO RIGHT OF PROPERTY IN RAILROAD EMBANKMENT, nor any right to compel the railway company to maintain such embankment as part of a levee built to protect his lands from overflow, and if a part of such embankment is carried away by a flood, and the company builds a bridge over the opening instead of repairing the break, and then files its petition for condemnation of lands required for the construction and operation of its road built on the plan adopted by the change, the land-owner cannot recover for loss resulting to him from the removal of the embankment built by the company.

INCREASED OR ADDITIONAL INJURY CAUSED BY ALTERATION IS MEASURE OF DAMAGES to land-owner for land not taken, but injured, in a proceeding for reassessment of damages, where a railroad company makes a change in the plan of constructing its road after it has been built.

MEASURE OF DAMAGES IN ORIGINAL PROCEEDINGS TO CONDEMN LAND FOR RAILROAD is the difference between the value of the land as a whole before and after the construction of the road built according of the plan proposed.

OWNER OF LAND TAKEN FOR RAILROAD MAY DEMAND NEW ASSESSMENT as to increased damages, if, after his damages have been assessed, a change is made in the plan of construction of the road involving more damages to his land.

BENEFITS TO PART OF TRACT OF LAND INJURED BY CHANGE OF PLAN of construction of a railroad must be considered in reduction of damages for injury to another part of the tract.

VERDICT MAY STATE AMOUNT OF DAMAGES IN GROSS SUM, and need not describe the lands for which damages are awarded, in a proceeding to condemn land for a railroad.

CONDEMNATION proceeding, by which the plaintiff in error seeks to obtain a right of way over the defendants' land. Before the filing of this petition, another company had constructed and operated a railroad over the land sought to be condemned, which railroad the plaintiff had purchased and was operating when it filed its petition. The defendants, by cross-petition, claimed damages for injury to adjacent lands, averring that the railroad divided a farm of about five hundred acres diagonally, leaving one hundred and sixty acres northeast and the remainder southwest of the road; that the grade of the road-bed acted as a dam against water flowing from the one hundred and sixty acres, thus overflowing and submerging it; that by reason of openings and bridges in the grade the lands southwest thereof were washed and overflowed, and that by inconvenience in passing from one part of said farm to the other, caused by said grade and the operation of the railroad, all of said lands were damaged. On the trial on this petition and cross-petition, there was a verdict and judgment for the defendants for \$4,134.50, from which the plaintiff appealed to this court: See the case reported in 118 Ill. 229. The record in that case showed that when the road was built, one Bennett owned all the lands in question, but that after the plaintiff became the owner of the road and the defendants bought the land from Bennett, a break of some 350 feet in length took place in the embankment during a flood, and instead of refilling the break, the plaintiff put a bridge in the opening, and since maintained it. It was held in that case that whatever damage was done to the

lands by reason of the original construction of the road accrued to Bennett, and not to the defendants, as held in the court below, and for that reason the judgment was reversed. But as it appeared that a change in the plan of construction in the grade had been made after the title vested in the defendants, it was held that they could recover for any increased damages caused by the change, and the cause was remanded for further proceedings in accordance with that decision. The defendants thereupon filed an amended cross-petition, basing their whole claim for damages to lands not taken on the change. In it they alleged generally that the land is injured by the alteration; but the specific claim is, that so much of the land as lies below or southwest of the grade is thereby overflowed, covered with drift, etc.; that levees constructed thereon had been washed out, and the building of others made impracticable. Plaintiff's attorneys then filed the stipulation, purporting to be an agreement on its part to restore the embankment to its original plan, and so maintain it. But on defendants' motion it was stricken from the files. Other facts necessary to an understanding of the case are stated in the opinion.

G. B. Burnett, for the plaintiff in error.

N. W. Branson and Edward Lanning, for the defendants in error.

WILKIN, J. The paper denominated a stipulation was properly stricken from the files. It was not, in any sense, an amendment to the original petition, as contended in argument, nor was it filed as such. It was not a plan or proposed plan of construction proper to be incorporated in the record, and therefore *Railroad Co. v. Kidder*, 21 Ill. 131, and other like cases cited have no application. No argument or citation of authorities is needed to show that attorneys employed to represent the company on the trial could not bind it by their agreement as to the plan of constructing its road. It is not claimed that they were given any such special authority.

The evidence which plaintiff sought to introduce for the purpose, as is claimed, of showing that the opening was not intended to be permanent, was incompetent as offered, and the court ruled properly in excluding it. No offer was made to prove, by proper evidence, that the company intended to change the plan upon which the road is at present constructed. For anything appearing in the offer of proof, the company may

have intended, after ascertaining the action of the water, to leave it just as it now is, or even so change it as to increase the injury. Having built the bridge, and maintained it as a part of the structure of its road for nearly three years, and having filed its petition to condemn, making no averment whatever of an intended or proposed change in the construction, it was not competent for plaintiff to prove merely that it did not intend the opening to be and remain permanent. If it had amended its petition so as to properly aver that it proposed to readopt the original plan of construction, and had supported it by the introduction of plans to be incorporated in the record, the question as to whether or not the opening should be treated as a permanent part of the construction would have been raised. On the present state of the pleadings, no such issue is presented.

The evidence introduced by the defendants to prove an injury to their house and levees was calculated to lead the jury to believe that such injuries were proper elements of damages to be considered in making their verdict, and should therefore have been excluded. If the sole object of its introduction was to illustrate the force with which water passed through the opening, as is now contended, it should have been so limited when offered.

There was manifest error in refusing to allow plaintiff to show that the alteration benefited the 160 acres above the grade. There is nothing, however, in the record to show that the testimony on that question could not have been introduced as well after the objection was withdrawn as when it was first offered. Therefore, if injury resulted to plaintiff for want of such evidence, it was self-imposed, and it cannot complain.

The question raised on the assignment of errors as to giving and refusing instructions involves a decision as to the correctness of the rule adopted by the trial court for the measure of damages. The lands in question border on the Sangamon River, and are, and always have been, subject to frequent overflow. There is no proof as to their value immediately prior to the construction of the railroad; but it does appear that Bennett, the grantor of defendants, purchased the entire tract from the county as overflowed land for one thousand dollars, and it is clear, from all the proof, that without levees to protect it against the frequent freshets from the Sangamon River, it is of but little value. After defendants purchased, and before the break in the grade of the road-bed, they built a

single line of levee from a point of high ground on the west, near the river, extending in an easterly direction, to and connecting with the railroad embankment, whereby they effectually leveed 280 acres of that part of the farm situated below or southwest of the road. On this trial, defendants confined their proof of damages to this 280 acres, and all the witnesses who make any estimate as to the amount of damages do so by giving their opinion as to the difference in value of that 280 acres before and after the change complained of was made, or with the above-mentioned levee and without it. For instance, the defendant Hamilton, in his evidence, says: "The fair market value of the land below this railway embankment, and within the line of our levee, at the time the opening in the embankment was made, I think is twenty-five dollars an acre. After the opening was made, I do not think it was worth more than ten dollars an acre. I figure this difference upon 280 acres, and the difference per acre was fifteen dollars." On cross-examination, as to this estimate, he says: "I took into account the levee there, and its connection with the embankment, and our use of the embankment as a part of the levee." While it is true that some of the witnesses speak of the increased force with which water is thrown upon the land below, and the impracticability of making levees with the opening in the grade, as elements of damages occasioned by the change, they make no estimate on that basis, nor do they furnish such facts as would enable a jury to do so, except on the theory adopted by Mr. Hamilton.

The court charged the jury, in the third and fourth instructions given on behalf of defendants, that "the proper measure of damages for land damaged, but not taken, is the difference between the market value of the land before and after the act of the railroad company which occasioned the damage"; that "the damages to be awarded to the defendants is the difference between the value of the land so damaged before, and the value of said land after, the break was made." Plaintiff asked an instruction (numbered 6 in its series) which would, in effect, have informed the jury that, in assessing defendants' damages, they should not take into consideration the fact that but for said opening defendants might maintain a levee by attaching the same to the railroad embankment, and use it as a part of such levee to protect their land from overflow; but the court refused to give it. From the evidence, and the giv-

ing and refusing of the above-mentioned instructions, it is manifest that defendants were allowed to recover, not only for the injury to their land occasioned by the construction and operation of a railroad built on the plan adopted by the change, but for loss resulting to them from the removal of an improvement put on the land by the plaintiff, or the company from which it purchased. Something is said in the argument about a contract by which defendants had a right to use the railroad embankment as part of their levee; but there is no proof of an agreement between them and the plaintiff which would vest in them an interest in the embankment, or a legal right to compel plaintiff to maintain it; nor did the law, in view of the circumstances under which it was built, give them, as owners of the land, any right of property therein: *Chicago etc. R. R. Co. v. Goodwin*, 111 Ill. 273; *Ellis v. Rock Island etc. R. R. Co.*, 125 Id. 82.

There is no claim, on behalf of defendants, that the change in construction was a wrongful or negligent act, and if there was, there could be no recovery by them in this proceeding for such wrong or negligence. It will be seen, by reference to the former opinion herein, that the case on this trial is to be treated simply as a proceeding for reassessment of damages as to the land not taken but injured, and that the measure of defendants' damages is the increased or additional injury, if any, caused by the alteration. In an original proceeding to condemn, the measure of damages is the difference between the value of the land, as a whole, before and after the construction of the road built according to the plan proposed: *Chicago etc. R. R. Co. v. Francis*, 70 Ill. 238; *Page v. Chicago etc. R'y Co.*, 70 Id. 324; *Eberhart v. Chicago etc. R'y Co.*, 70 Id. 347; *Dupuis v. Chicago etc. R'y Co.*, 115 Id. 97; *Chicago etc. R. R. Co. v. Bowman*, 122 Id. 595. As to these lands, such damages accrued to Bennett, as heretofore decided. If, after damages have been assessed, or settled by agreement, a change in the plan of construction, involving more damages, is made, the owner may demand a new assessment as to such increased damages: *Mills on Eminent Domain*, 219. To the same effect is the holding in the former decision herein. The proper inquiry, on this trial, was, whether or not the lands in question, as a whole, were damaged more by the railroad built on its present plan than they were as it was first constructed, and if they were, to determine the amount of such increased damages.

We think the giving of defendants' third and fourth instructions, and the refusal of plaintiff's sixth, was error.

The giving of defendants' first instruction was also error. By it the jury were instructed that if they should find that the alleged change was made, and that by means thereof the lands of defendants below and adjoining the railroad were damaged, then the defendants are entitled to just compensation for the damages so done to their said land. There is some evidence in the record tending to show that the 160 acres above the road was benefited by the change; yet this instruction takes the consideration of such benefits from the jury entirely, and confines their inquiry to the 280 acres which was damaged. As already stated, and as will be seen from *Page v. Chicago etc. R'y Co.*, *supra*, and other cases above cited, the measure of damages in such a proceeding, as to lands injured but not taken, is the difference in the value of the property, as a whole, before and after the construction of the road, and therefore, even if it had been proper to allow defendants damages for being deprived of the use of the embankment as a levee to the 280 acres, the benefits to other portions of the farm should have been considered in reduction of such damages. The amended cross-petition did not have the effect of confining the inquiry to the lands below the road, as counsel assume. The trial below seems to have been conducted throughout as a proceeding in the nature of an action for damages resulting to the 280 acres by reason of a negligent or wrongful failure on the part of plaintiff to properly maintain its embankment, rather than a proceeding to ascertain just compensation under the eminent-domain laws of this state.

Under the last assignment of error, it is insisted that the verdict is fatally defective, because it finds a gross sum to be paid defendants, instead of compensation and damages separately, and in failing to describe the land. The authorities cited in support of this position are not in point. They simply hold that the verdict in such proceeding must conform to the requirements of the law under which it is had. We find nothing in our present statute requiring a more definite or specific finding by the jury than is here returned. The verdict is sustained by *Peoria, P. & J. R. R. Co. v. Peoria & S. R. R. Co.*, 66 Ill. 174, and *Illinois etc. R. R. Co. v. Mayrand*, 93 Id. 591.

For the errors indicated, the judgment of the circuit court must be again reversed, and the cause remanded.

ATTORNEY AND CLIENT—POWERS OF ATTORNEYS—DELEGATION OF AUTHORITY—STIPULATIONS AS TO CONDUCT OF THE TRIAL—ADMISSIONS—EXECUTION OF BONDS—POWER TO DISMISS; TO COMPROMISE; TO ENTER RETRAKIT; TO CONFESS JUDGMENT; TO PROSECUTE APPEAL; TO PROCEED AFTER JUDGMENT, ETC.: See extended note to *Clark v. Randall*, 76 Am. Dec. 250-265; *Kirk's Appeal*, 30 Am. Rep. 358-361. A solicitor has no authority under his general retainer to surrender any substantial right of his client, and a disclaimer intended to operate as a release must be signed by the defendant himself, and his signature attested by a competent witness: *Dickerson v. Hodges*, 43 N. J. Eq. 45. While an attorney may not have authority to accept a deed for mortgaged land in satisfaction of a judgment of foreclosure, and bind his client by the terms of the conveyance, yet the client cannot, while retaining the land, repudiate the terms of the conveyance on the ground that his attorney exceeded his authority: *Schleissman v. Kallenberg*, 72 Iowa, 342.

EMINENT DOMAIN.—THE APPROPRIATION OF A HIGHWAY FOR RAILWAY PURPOSES IMPOSES A NEW SERVITUDE thereon, entitling the owner of the soil to compensation for the new use: *Hinchman v. Paterson etc. R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252; *Williams v. New York Central R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; 68 Am. Dec. 392; compare *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515; 28 Am. Rep. 264; *Perry v. New Orleans etc. R. R.*, 55 Ala. 413; 28 Am. Rep. 740. When private property has been once taken for a specific use by the public and compensation therefor made, it should not be used for a foreign purpose without a new legal taking, but it may be applied to any new mode of user tending to the primary or general purpose: *Fulton v. Short etc. R'y Co.*, 85 Ky. 640; 7 Am. St. Rep. 619. See extended note to *Sheehy v. Kansas City Cable R'y Co.*, 94 Mo. 574, 4 Am. St. Rep. 399-405, for general discussion on damages and compensation for public use of private property; also see *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659, and note 669; *Potts v. Pennsylvania etc. R. R. Co.*, 119 Pa. St. 278; 4 Am. St. Rep. 646, and note 650; *Ohio & M. R'y Co. v. Wackler*, 123 Ill. 440; 5 Am. St. Rep. 532, and note 537-540.

EMINENT DOMAIN.—MEASURE OF DAMAGES—RULE FOR THE ESTIMATION OF: *Little Rock etc. R. R. Co. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51, and note; *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472; 2 Am. St. Rep. 618, and note 623; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100, and note 113; *Toledo etc. R'y Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564; 4 Am. St. Rep. 875, and note; *Indiana etc. R'y Co. v. Allen*, 113 Ind. 308; 3 Am. St. Rep. 650. In considering the benefits accruing to that portion of a tract of land not taken under condemnation proceedings for a public use, only such benefits as result directly and peculiarly to the particular tract are to be taken into consideration in determining the damages: *Whitely v. Mississippi Water etc. Co.*, 38 Minn. 523. In the assessment of damages for land taken by a municipality, evidence of the cost of a recent addition to the house thereon is not admissible; but evidence offered on the part of the municipality of the price at which neighboring estates in the same street with buildings thereon were sold a few months after the taking, in absence of proof that the buildings were dissimilar, and it further appearing that the taking had

been really a benefit by way of increase in value to the property, was admissible: *Patch v. City of Boston*, 146 Mass. 152. In a proceeding for condemnation of land for a right of way for a railway, the court correctly instructed the jury that in considering the compensation to be paid for the land taken they should fix the actual cash value of the land when taken, and in so doing they must not consider the price at which the property would sell for under extraordinary circumstances, but its fair cash market value if sold in the market under ordinary circumstances, for cash, and not on time, assuming that the owner was willing to sell, and there was a purchaser equally desirous of buying: *Brown v. Calumet R. R'y Co.*, 125 Ill. 664.

EVIDENCE. — CIRCUMSTANCES HAVING NO DIRECT CONNECTION WITH THE CASE should not be admitted as evidence: *Dupree v. State*, 33 Ala. 380; 73 Am. Dec. 422; *Shilling v. Carson*, 27 Md. 175; 92 Am. Dec. 632. Evidence is inadmissible to prove facts not alleged in the pleadings: *Winston v. Taylor*, 28 Mo. 82; 75 Am. Dec. 112; *Baswell v. Goodwin*, 31 Conn. 74; 81 Am. Dec. 169; *Maynard v. Fireman's Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672; *Finley v. Quirk*, 9 Minn. 194; 86 Am. Dec. 93; *Price v. Tyson*, 3 Bland, 892; 22 Am. Dec. 279.

McDONALD v. PEOPLE.

[126 ILLINOIS, 150.]

EVERY PERSON CHARGED WITH CRIME IS ENTITLED TO FAIR AND IMPARTIAL TRIAL; and it is the duty of the courts to see that the guaranty of such a trial, conferred by the laws upon every citizen, shall be upheld and sustained.

WHILE MUCH LATITUDE IS ALWAYS ALLOWED COUNSEL IN STATEMENT OR ARGUMENT of a case, there are bounds which ought not to be transcended. As a general rule, a full statement of the facts expected to be proved on the trial, with a statement of the law relied upon, is sufficient.

ATTORNEY FOR PEOPLE SHOULD NOT BE ALLOWED TO BRING BEFORE JURY, in his opening statement, matters with which they have nothing to do, such as the force, effect, or office of exceptions that may be taken by defendant's counsel during the trial, the fact that the defendant has applied for a change of venue, or the fact that the law has been so changed that a defendant may testify in his own behalf; nor should he be permitted to state to the jury that, in case the defendant is found guilty, he has a right to an appeal to the supreme court, whose judges will consider whether or not they will grant him a new trial; or to ridicule to the jury the laws of the state under which criminals are tried. And when objection is made, he should be compelled to confine his argument to a consideration of such matters as properly pertain to the case under the evidence.

WHERE BILL OF PARTICULARS IS FURNISHED IN CRIMINAL CASE, the evidence to establish a conviction must be confined to the specifications therein contained. And where, in the trial of an indictment for a conspiracy to defraud a county by means of fraudulent bills for labor and materials, the prosecution, by order of the court, furnishes a bill of particulars relating only to bills for work and materials for the normal school, it is error to permit the prosecution to give evidence of other

bills for labor and materials for the court-house, insane asylum, infirmary, and hospital, the bills relating to these different institutions, and the fraudulent pretenses relating thereto, having no immediate or direct connection with each other. The effect of the bill of particulars in such case is to narrow the issue to the fraudulent bills relating to the normal school, and to exclude evidence of all others.

DISTINCT OVERT ACTS OF CONSPIRACY MAY BE GIVEN IN EVIDENCE when the issue is whether the accused is guilty of a general conspiracy; and when the issue is whether a party is guilty of a specific overt act of conspiracy, it is competent to give in evidence other overt acts of conspiracy, which include, or are dependent upon, or constitute a part of, the *res gestæ* of that act; but to prove a specific overt act, it is not admissible to give in evidence wholly disconnected and independent overt acts having no other relevancy to each other than that they are overt acts of the same parties.

WHERE GENERAL CHARGE IN INDICTMENT IS RESTRICTED BY BILL OF PARTICULARS furnished to the defendant, instructions which wholly ignore such restrictions are erroneous.

MODIFICATION OF INSTRUCTION ERRONEOUS WHEN. — Where, notwithstanding the fact that a general charge of conspiracy in an indictment is, by a bill of particulars furnished the defendant, restricted to transactions relating to the normal school, evidence as to transactions relating to other institutions, not inseparably connected with the transactions relating to the normal school, has been admitted on the trial, it is error to strike out from an instruction asked by the defendant these words: "The defendants are not, in this case, charged with conspiring to defraud the county by bribing county commissioners to allow exorbitant and unjust bills. Neither are they upon trial for conspiracy to defraud the county in any way, in any transactions other than those relating to the repairs at the normal school."

INDICTMENT for conspiracy. The opinion states the case.

C. Beckwith and W. S. Forrest, for the plaintiff in error.

George Hunt, attorney-general, *Joel M. Longenecker*, state's attorney, and *Stiles and Lewis*, for the people.

CRAIG, C. J. This was an indictment in the criminal court of Cook County against Nicholas Schneider, William J. McGarigle, Frederick Faber, and Edward S. McDonald, in which the defendants were charged with a conspiracy to obtain money from Cook County by false pretenses. The indictment contained several counts, some of which charge a conspiracy to defraud the county by means of false pretenses generally, while others charge a conspiracy to defraud the county with respect to repairs at the normal school. At the June term, 1887, of the criminal court, McGarigle and McDonald were tried, jointly, before a jury. The two other defendants, Schneider and Faber, were not put upon trial, but were used as witnesses by the people against McGarigle and

McDonald. The jury found the two defendants guilty, and fixed their term of imprisonment at three years in the penitentiary. Edward S. McDonald alone sued out this writ of error.

Various errors have been assigned, and elaborate arguments have been filed in behalf both of the defendant and the people. We shall not, however, undertake to follow counsel, and consider all the questions raised, but will content ourselves with the consideration of a few questions which are decisive of the judgments rendered both in the trial and appellate courts.

Every person charged with a crime is entitled to a fair and impartial trial, — a trial in conformity to the laws of the state, — and it is a duty resting upon the courts to see that this guaranty conferred by the laws upon every citizen is upheld and sustained. A fair and impartial administration of the laws is one of the most sacred rights of the citizen, — one that cannot be abridged or frittered away. In looking over the record before us, we are not satisfied that the defendant McDonald had a fair and impartial trial in the criminal court. Improper evidence was admitted, the instructions to the jury did not lay down the law correctly, and other irregularities occurred during the trial which doubtless led to the verdict returned by the jury. Under the last head may be mentioned the opening statement of the case to the jury made by the counsel for the people. Much latitude is always allowed counsel in the statement or argument of a case to a jury; but there are bounds which ought not to be transcended. As a general rule, a full statement of the facts expected to be proven on the trial, with a statement of the law relied upon, would seem to be sufficient; but here the court ruled that counsel for the people might elect the manner in which to make his opening. He was allowed to talk about the “boodle prosecutions in New York City,” to discuss and explain to the jury the meaning and office of an “exception” entered by counsel for defendant. Among other things, it was said “that the object of taking exceptions was to get error in the record; that everything said is taken down by the stenographers; that in case the defendants are found guilty, they have a right to take an appeal to the supreme court; that the whole record goes up to the supreme court; that if the judge has made a remark which he ought not to have made, and which very likely he has, those seven wise men down at Ot-

tawa, if it shall appear to them that any remark was made which might have prejudiced the cause of these gentlemen who have been found guilty, will consider whether or not they will grant them a new trial; that errors may be run all through the case." The counsel for the people also informed the jury that the law had been so changed that any defendant might testify in his own behalf. Objection being made to this statement, and overruled, counsel then said: "There is another exception. The court thinks I am right, or he would tell me to vary my line of argument." The jury were also told that the defendants had applied for a change of venue to another county, and the application for a change was commented upon at length. Other matters wholly foreign were stated and argued to the jury. Indeed, full liberty was given counsel for the people by the court to make any statement he saw proper to make, whether it had any legitimate bearing on the case or not. The manner in which legal proceedings are required to be conducted under the laws was ridiculed at great length by counsel for the people, with the sanction and approval of the court.

It is a proposition too plain to admit of argument, that the jury had nothing to do with the force or effect or the office of an exception that might be taken by counsel during the trial; nor could they take into consideration the fact, if it was a fact, that the defendants had applied for a change of venue; nor was it material for them to know that the law had been so changed that a defendant might testify in his own behalf; and it is plain that the court ought not to have permitted the attorney for the people to bring these matters before the jury in the opening statement. In *State v. Kring*, 64 Mo. 595, where the jury were told, in the argument, that if they wronged the defendant by finding him guilty, that wrong can be righted by an appeal by the defendant to the supreme court, the remark was held to be error. It is there said: "The statements that the higher court referred to had the power to review the finding of the jury on the weight of evidence was calculated to induce the jury to disregard their responsibility."

Our statute, which allows a defendant in a criminal case to testify, declares that "his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." Under this statute, why was the attorney of the people allowed

to comment, before the jury, on the right of the defendants to testify in the case?

In *State v. Smith*, 75 N. C. 307, a judgment wherein a defendant was convicted was reversed upon the ground alone that the attorney for the people was allowed, in addressing the jury, to state that "the defendant was such a scoundrel he was compelled to move his trial from Jones County to a county where he was not known." And yet, in this case, counsel for the people was permitted to argue at great length upon the fact that the defendants had applied for a change of venue, and the application had been denied.

The defendants were charged with a crime which was a violation of the laws of the state. They were on trial under the laws of the state. The inquiry is a pertinent one, why the laws of the state under which criminals are tried were permitted to be ridiculed in the opening argument to the jury. What the object of counsel was in pursuing the course that was pursued may be difficult to understand; but whatever may have been the object, the effect of what was done without doubt created a prejudice in the minds of the jury, and may have, in part at least, led to the verdict which was rendered.

Again, in the closing argument to the jury on behalf of the people, counsel were allowed to travel outside of the record, and discuss M. C. McDonald, and his influence in the administration of justice in Chicago. Among other things, the state's attorney said: "They say there is a fabled tree which grows in some torrid clime; that the birds of the air which fly near its branches, influenced by the aroma of it, fall beneath it and die. That is the influence of M. C. McDonald in this and all matters connected with the administration of justice." Other allusions of a similar character were made in the argument to the same person. He was in no manner connected with the case, and upon objection being made, it was the duty of the court to confine the argument to a consideration of such matters as properly pertained to the case under the evidence: *People v. Mitchell*, 62 Cal. 411; *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201; 38 Am. Rep. 573; *Rolfe v. Inhabitants of Rumford*, 66 Me. 564.

The indictment contained six counts, but the state's attorney dismissed the fifth count out of the case. The first four counts charged the defendants, in general terms, with a conspiracy to defraud Cook County by means of false pretenses.

The last count charged a conspiracy to defraud Cook County by means of false pretenses as to work done and materials furnished at the normal school, in 1886. Before the cause was called for trial, the defendant filed a motion in writing, requesting the court to enter an order requiring the state's attorney to file a bill of particulars. After due consideration the court granted the order, and in response thereto, the state's attorney filed what is known in the record as the original bill of particulars. The bill of particulars thus filed did not, however, prove to be satisfactory to the defendant. It was but little more definite or specific, as to the character of the charge, than the indictment. The defendant then filed a petition for a further and better bill of particulars, which, upon due consideration, the court granted, and entered an order requiring the state's attorney to furnish defendant McDonald a further and better bill of particulars. In the order, the state's attorney was required "to furnish the defendant McDonald the date and number of all bills, vouchers, or warrants which are relied upon by the people, and which have been on file in any county office, and which have been in the possession of the state's attorney; and also that the said people permit the inspection of the said bills, vouchers, and warrants by the attorneys for said Edward S. McDonald, or some of such attorneys; also that said people furnish the defendant Edward S. McDonald the dates between which the work or labor done, or pretended to be done, was done or pretended to be done; also, that the state's attorney permit the defendant McDonald and his counsel to examine and inspect any books which the state's attorney claims were kept in pursuance of the conspiracy charged in the indictment."

The amended bill of particulars furnished McDonald is as follows:—

"1. The dates between which the labor was done, or pretended to have been done, and the material furnished, or pretended to have been furnished, by said Nicholas Schneider, as set forth in the bill of particulars heretofore furnished said defendants, McGarigle and Edward S. McDonald, are January 1, 1886, until January 1, 1887.

"2. The dates and numbers of bills that are relied upon are: No. 7, August 2, 1886; No. 9, August 9, 1886; No. 12, August 16, 1886; No. 13, September 4, 1886; No. 15, September 13, 1886; No. 18, September 20, 1886; No. 23, October 2, 1886; No. 26, October 9, 1886; No. 27, October 16, 1886; No.

31, November 1, 1886; No. 36, November 8, 1886; No. 40, November 20, 1886.

“JULIUS S. GRINNELL, State's Att'y.”

The order of the court under which the last bill of particulars was furnished is plain, and cannot be misunderstood. The dates and numbers of all fraudulent bills, vouchers, or warrants relied upon by the people to secure a conviction, by the order were to be furnished by the state's attorney to the defendant. The order of the court was obeyed, and a list of the fraudulent bills which were to be relied upon on the trial to secure a conviction was submitted to the defendant. The bills relied upon were twelve in number, the first bearing date August 2, 1886, and the last, November 20th, of the same year. They all related to services performed and materials furnished at the normal school. Under the bill of particulars which had been furnished, it was contended, on the trial, by the defendant, that the evidence should be confined to the normal-school transactions; but this position was overruled by the court, and the people were allowed to introduce evidence of fraudulent bills for services rendered and materials furnished at the court-house, insane asylum, infirmary, and the hospital. Some twenty-nine of Schneider's bills, relating solely to these places, were introduced in evidence to establish the charge of conspiracy to defraud Cook County in rendering fraudulent bills for services rendered and materials furnished at the normal school, as stated in the bill of particulars.

The ruling of the court on the admission of this evidence presents a question of importance, and one, too, not entirely free from difficulty. Where the charge in the indictment is a general one, as is usually the case in an indictment of this character, it is a matter of great importance to a defendant to obtain a bill of particulars, in order that he may know, specifically, what he will be required to meet on the trial. If, however, after a bill of particulars has been furnished, the evidence to establish a conviction is not confined to the specifications therein, what benefit is to be derived from a bill of particulars? Where is the necessity for an order of court requiring a bill of particulars? *Commonwealth v. Snelling*, 15 Pick. 326, is an interesting case on the subject. The defendant was indicted for a libel on the character of one Benjamin Whitman, a justice of the police court, charging him, in various forms, but in general terms, with misconduct and mal-

practice in the discharge of the duties of his office. Prior to the coming on of the trial, the defendant was required by the court to state whether he intended to offer proof of the truth of the misconduct charged in the publications alleged to be libelous, and if so, to file specifications of the cases and instances of misconduct intended to be given in evidence, and on the trial the defendant was prohibited from giving evidence of the truth of the supposed libel, except according to the specifications so filed. The order of the trial court was fully sustained, and upon one branch of the question the court said: "And in regard to another exception, namely, that the defendant having, in his bill of particulars, specified certain cases, and added the words 'and others,' was prohibited from going into evidence of cases not otherwise specified. All the reasons which require a specification require that the defendant should be confined to the cases specified, otherwise the purpose of the order would be wholly defeated."

In *People v. McKinney*, 10 Mich. 54, which was an indictment for embezzlement, in speaking of the office of a bill of particulars, the court said: "The particulars called for, if furnished, would not have constituted strictly a part of the information, nor any part of the record proper. It would not have constituted the charges upon which the defendant was to be tried, as the defendants seem to suppose. Its only purpose and effect are to inform the defendant of the nature of the evidence, and the particular transactions to be proved under the information, and to limit the evidence to the items and transactions stated in the particulars."

Regina v. Esdaile, 1 Fost. & F. 213, was an information for conspiracy. Prior to the trial, bills of particulars having been delivered under an order of court, and evidence of transactions not named therein having been offered and rejected, the court held "that particulars having been ordered of overt acts, the counsel for the crown were confined within them." See also *Commonwealth v. Davis*, 11 Pick. 434.

A leading case on the question is *Commonwealth v. Giles*, 1 Gray, 468. The defendant was indicted as a common seller of spirituous and intoxicating liquors. Before the trial, defendant, upon his motion, had been furnished, by order of the court, with a list specifying the names of the persons to whom sales would be proved. At the trial, the district attorney offered evidence of other sales to persons not named in the specification. The evidence was admitted against the objec-

tion of the defendant. The supreme court, in passing upon this question, said: "It is now a general rule, perfectly well established, that in all legal proceedings, civil and criminal, bills of particulars, or specifications of facts, may and will be ordered by the court whenever it is satisfied that there is danger that otherwise a party may be deprived of his rights, or that justice cannot be done." The court then discusses the question whether the order of court granting a bill of particulars is final, inclining to the view that it is. The court then said: "But whether this be so or not, when it is once made, it concludes the rights of all parties who are to be affected by it; and he who has furnished a bill of particulars under it must be confined to the particulars he has specified as closely and effectually as if they constituted essential allegations in a special declaration. The evidence, therefore, of sales not mentioned in the list which was furnished to the defendant in the present case was inadmissible, and should have been rejected. The particular purpose for which it was allowed to be adduced, scarcely, if at all, limiting or diminishing its general force and effect, constituted no exception to the general rule, and afforded no sufficient or legal reason for disregarding it."

The court of last resort in New York, in *Starkweather v. Kittle*, 17 Wend. 21, in speaking of a bill of particulars, said: "The declaration, plea, or notice of set-off may be so general in its terms that the opposite party will not be fully apprised of the demand which will be set up on the trial, and he is therefore permitted to call on his adversary to give a more detailed and particular statement of the claims on which he intends to rely. When the bill is furnished, it is deemed a part of the declaration, plea, or notice to which it relates, and is construed in the same way as though it had originally been incorporated in it."

It will be observed that in the last case cited, the court treats a bill of particulars, when furnished, as a part of the declaration, plea, or notice to which it relates, while in the *Giles* case it is said, he who furnishes a bill of particulars must be confined to the particulars as closely as if they constituted essential allegations in a special declaration, and the evidence was confined strictly to the bill of particulars.

It will also be observed that in the case of *People v. McKinney*, *supra*, the court seems to take a slightly different view of the office of a bill of particulars, and says it does not constitute a part of the record, but its office is to inform the de-

fendant of the nature of the evidence, and the particular transactions to be proved. These different expressions in the authorities are more formal than otherwise. The object of a bill of particulars is to give the accused notice of the specific charge he is required to meet on the trial, so that he may be prepared to defend. Here, the state's attorney, had he seen proper, might have given notice in the bill of particulars that fraudulent bills for labor and materials had been presented by Schneider, relating to the court-house, insane asylum, infirmary, and the hospital, specifying the date and amount in each case. Then the evidence relating to the bills at these various institutions might have been properly admitted; but he saw proper to limit the charge to twelve specific bills for labor and materials on the normal school. Having done this, under the plainest principles of law relating to the admission of evidence under an averment in a pleading,—treating the bill of particulars as a pleading,—the evidence ought to have been confined to the twelve bills specified in the bill of particulars, otherwise the bill of particulars was a delusion,—a legal snare,—furnished for the purpose of deceiving the defendants. It is not claimed that the act of presenting normal-school bills was connected with the presentation of the other bills in such a manner that they were on that account inseparable; nor was such the case. The bills of the different county institutions, and fraudulent pretenses relating thereto, had no immediate or direct connection with each other. In order to establish a conspiracy on the part of the defendants in regard to the work and materials on the normal school, it was not necessary to prove that Schneider had presented fraudulent bills as to work and materials furnished at the court-house, insane asylum, infirmary, and hospital, and it was erroneous to allow such evidence to go to the jury. The effect of the bill of particulars furnished by the state's attorney under the order of the court was to narrow the issue to the fraudulent bills relating to the normal school, and, as a necessary consequence, exclude all evidence of a conspiracy to obtain money from Cook County, except as to the bills for labor and materials furnished on the normal school.

We are not unmindful that it is competent, when the issue is whether a party is guilty of a general conspiracy, distinct overt acts of conspiracy may be given in evidence, and that when the issue is whether a party is guilty of a specific overt act of conspiracy, it is competent to give in evidence other

overt acts of conspiracy which include or are dependent upon or constitute a part of the *res gestæ* of that act; but it has never been held admissible to give in evidence to prove a specified overt act, wholly disconnected and independent overt acts having no other relevancy to each other than that they are overt acts of the same parties.

What was said in the case of *Ochs v. People*, 124 Ill. 399, in regard to the admission of evidence, has no application to the facts of this case. There the defendants were charged with a conspiracy to obtain money from Cook County by means of false pretenses. The indictment contained five counts, but the state's attorney elected to proceed under the first four counts of the indictment, which were, in substance, as follows: The first charges that the defendants and others, on November 1, 1885, etc., feloniously conspired together, with the fraudulent and malicious intent then and there feloniously, wrongfully, and wickedly, by divers false pretenses, and with indirect means, to cheat and defraud said county of Cook of its moneys, etc. The second count charges a conspiracy to obtain the moneys and property of Cook County by false pretenses, and to cheat and defraud the county, and that in pursuance of the conspiracy they did obtain large amounts of goods, moneys, etc., of the value of one hundred thousand dollars, of the county, by false pretenses. The third and fourth counts charge a conspiracy between the parties to obtain from the county by false pretenses divers large sums of money, of the value of one hundred thousand dollars. It will be observed that the charges in the indictment are of a general character. What particular pretenses were resorted to is not charged. Under such charges in an indictment, the evidence, as it did on the trial of the cause, might take a wide range; but in the case under consideration, the charge, as heretofore shown, having been limited, what may have been said in the *Ochs* case in reference to the admission of evidence can have no bearing here.

In the fifteenth instruction for the prosecution, the jury were told "that any evidence which has been admitted by the court in the presence of the jury is for the consideration of the jury, and should be considered by them in making up their verdict." In quite a number of the instructions given at the instance of the people, the jury were instructed that they should find the defendants guilty, if they believed, from the evidence, beyond a reasonable doubt, that they were guilty "as charged in the

indictment." These instructions wholly ignored any restrictions placed upon the general charge contained in the indictment by the bill of particulars which was furnished the defendants, and by these instructions, thus wholly unqualified the jury were left at perfect liberty to find the defendants guilty of a conspiracy to obtain money by false pretenses, by means of either false and fraudulent court-house bills, hospital bills, asylum bills, infirmary bills, or normal-school bills.

Twenty instructions were given by the court on behalf of the people. In no one of these instructions was the jury directed to acquit the defendants unless they found them guilty of the normal-school conspiracy, — the conspiracy for which they were placed upon trial. In order to meet this difficulty, and place that question in a proper light before the jury, the defendants' counsel prepared instruction No. 2, which, among other things, contained the following: "The defendants are not, in this case, charged with conspiring to defraud the county by bribing county commissioners to allow exorbitant and unjust bills. Neither are they upon trial for conspiracy to defraud the county in any way, in any transactions other than those relating to the repairs at the normal school, undertaken by Nicholas Schneider." This part of the instruction was stricken out by the court, and as modified, the instruction was then given to the jury. As that part of the instruction stricken out by the court was not embraced in any other instruction, we think the modification was erroneous. Under the bill of particulars furnished by the people, the only conspiracy involved on the trial related to the materials furnished and repairs done by Schneider at the normal school, and the defendants had the right to have the jury so instructed. As has been said before, much evidence in regard to fraudulent transactions had been introduced, relating solely to labor and materials at the court-house, insane asylum, infirmary, and hospital. This evidence being before the jury, they were as likely to convict the defendants of a conspiracy in regard to repairs at one of those institutions as they were in regard to the repairs at the normal school, unless they were instructed by the court that the defendants were not on trial for conspiracy to defraud Cook County in any transactions other than those relating to the normal school. How could the jury know upon which one of the five transactions relating to the five county institutions they were authorized to return a verdict, unless directed by the court in the instructions? It is ap-

parent the jury were left entirely in the dark upon this question, and for aught that appears, the jury may have been satisfied that no conspiracy was established in regard to the repairs for which bills were rendered in reference to the normal school, and yet found the defendants guilty as to some one of the other institutions, — an offense for which they were not on trial.

The manner in which the case was submitted to the jury by the instructions leaves it impossible to determine whether the defendant was convicted of the offense upon which he was put upon trial, or for some other or different offense. We are not prepared to hold that a conviction of this character can be sustained. The modification of the instruction was, in our judgment, erroneous, and that, too, in a vital point in the case.

It is claimed that other irregularities and errors occurred on the trial which led to the conviction of the defendant, but it will serve no useful purpose to consider them here.

We are satisfied that the defendant was not tried in conformity to law, and for the errors indicated, the judgments of the appellate and criminal courts will be reversed, and the cause remanded for another trial.

MISCONDUCT OF COUNSEL IN ARGUMENT, WHEN SO SERIOUSLY IMPROPER AS TO CALL FOR REVERSAL OF JUDGMENT. — The law justly regards argument by counsel as a most efficient means for arriving at the truth, and it accords to counsel a very large degree of freedom, so long as they confine themselves to a discussion of the facts properly in evidence in the cause. In the nature of things, it is extremely difficult to formulate rules by which to determine when the statements of counsel are so flagrantly improper as to justify the court in reversing a judgment or granting a new trial.

1. It may be regarded as an established rule that it is error, sufficient to reverse a judgment, for counsel, against objection, to state facts pertinent to the issue, and not in evidence, or to assume in argument that such facts are in the case, when they are not: *Hilliard on New Trials*, 225; *Proffatt on Jury Trial*, sec. 250; *McAdory v. State*, 62 Ala. 154; *Cross v. State*, 68 Id. 476; *Wolfe v. Minnis*, 74 Id. 386; *Little Rock etc. R'y Co. v. Cavenesse*, 48 Ark. 106; *People v. Mitchell*, 62 Cal. 411; *Newton v. State*, 21 Fla. 53; *Berry v. State*, 10 Ga. 511; *Mitchum v. State*, 11 Id. 615; *Dickerson v. Burke*, 25 Id. 225; *Yoe v. People*, 49 Ill. 410; *Felix v. Scharnweber*, 119 Id. 445; *Chicago etc. R. R. Co. v. Bragonier*, 13 Ill. App. 467; *Chase v. City of Chicago*, 20 Id. 274; *Ferguson v. State*, 49 Ind. 33; *Kinnaman v. Kinnaman*, 71 Id. 417; *Combs v. State*, 75 Id. 215; *Rudolph v. Landwerlen*, 92 Id. 34; *School Town of Rochester v. Shaw*, 100 Id. 268; *Brow v. State*, 103 Id. 133; *Martin v. Orndorff*, 22 Iowa, 504; *Hall v. Wolff*, 61 Id. 559; *Henry v. Sioux City etc. R'y Co.*, 70 Id. 233; *Huckell v. McCoy*, 38 Kan. 53; *Rolfe v. Rumford*, 66 Me. 564; *Taft v. Fiske*, 140 Mass. 250; 54 Am. Rep. 459; *Scripps v. Reilly*, 35 Mich. 371; 24 Am. Rep. 575; *Rickabus v. Gott*, 51 Mich. 227; *People v. Dane*, 59 Id. 550;

Martin v. State, 63 Miss. 505; 58 Am. Rep. 812; *Gibson v. Zeibig*, 24 Mo. App. 65; *Cleveland Paper Co. v. Banks*, 15 Neb. 20; 48 Am. Rep. 334; *Bullis v. Drake*, 20 Neb. 167; *Tucker v. Henniker*, 41 N. H. 317; *Bullard v. Boston and Maine R. R. Co.*, 64 Id. 27; *Baldwin v. Grand Trunk R'y Co.*, Sup. Ct. N. H., July, 1888; *Perkins v. Burley*, Sup. Ct. N. H., July, 1888; *Fry v. Bennett*, 3 Bosw. 200; *Reich v. Mayor etc. of New York*, 12 Daly, 72; *Jenkins v. North Carolina Ore Dressing Co.*, 65 N. C. 563; *Union C. L. I. Co. v. Cheever*, 36 Ohio St. 201; *Willis v. McNeill*, 57 Tex. 465; *Galveston etc. R. R. Co. v. Cooper*, 70 Id. 67; *House v. State*, 9 Tex. App. 567; *Conn v. State*, 11 Id. 390; *Grosse v. State*, 11 Id. 364; *Laubach v. State*, 12 Id. 583; *Clark v. State*, 23 Id. 260; *Tillery v. State*, 24 Id. 251; *Brown v. Swineford*, 44 Wis. 282; 28 Am. Rep. 582; *Bremmer v. Green Bay etc. R. R. Co.*, 61 Wis. 114; *Hardke v. State*, 67 Id. 552; *Sasse v. State*, 68 Id. 530.

In delivering the opinion of the court in *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582, Ryan, C. J., said: "The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. . . . If counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial or for a reversal in this court." In *Tucker v. Henniker*, 41 N. H. 325, Fowler, J., delivering the opinion of the court, said: "When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they, in the slightest degree, influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested."

A few instances of improper conduct on the part of counsel are here given by way of illustration. In the case of *Chase v. City of Chicago*, 20 Ill. App. 274, which was an action brought by the plaintiff to recover damages sustained by her in stepping into a hole in the sidewalk, in the city of Chicago, and breaking her leg, the counsel for the city, in the course of his argument, stated, over the objection of Mr. Gibbons, the plaintiff's attorney, that, in the position occupied by him as city attorney, it was customary for him to try cases brought against the city, some of which were meritorious, and

others based upon fraud and perjury; that it became his duty, as representative of the tax-payers of the city, to characterize this as one of the cases which had not a shadow of merit, — a case based upon fraud and perjury, and maintained by a conspiracy between John Gibbons, plaintiff's attorney, and Dr. Angear; that it was a blackmailing scheme to extort money from the city; that he hoped the jury would remember, after they retired to their jury-room, that Mrs. Chase was very little interested in the result; that the amount of the verdict which they would give her would be divided into three equal parts, one third going to Mrs. Chase, one third to Dr. Angear, and one third to John Gibbons; that he hoped the jury would not permit these men, who came from Iowa, — this Iowa contingent, — to profit by such a conspiracy. Thereupon he turned around in a threatening and boisterous manner, stood in front of John Gibbons, where he was sitting, shook his fist in his face, and hallooed at the top of his voice, repeating the question three times: "Why didn't you put Mr. Chase upon the witness-stand, John Gibbons?" and answering: "I will tell you why. Because you knew that that old gray-haired man would not perjure himself for you, and you could not perpetrate this fraud and conspiracy with his assistance." In delivering the opinion of the court, McAllister, P. J., said: "There are cogent reasons why appellate courts should be careful and critical in recognizing alleged improper statements of counsel in argument as affording ground for reversal. But every case must depend upon its own circumstances. It would seem consistent with the ordinary principles upon which justice is administered, that if in this case the statements complained of were material, and this court can see, from an examination of the evidence, that they were likely to and probably did wrongly influence and mislead the jury to return a verdict against the plaintiff to her manifest prejudice, this court should redress the wrong by reversing the judgment. We think such was the case."

In *Rudolph v. Landwerlen*, 92 Ind. 34, the counsel used language of this import: "It is in evidence that this defendant is a Catholic priest, and all of his witnesses are members of his church; and it is a strange coincidence that they track the evidence of the defendant with that minuteness and precision in the use of words and language that cannot be accounted for, except, as shown by the evidence, they heard the defendant from the pulpit detail his version of the case, and they can come here and swear to his version of the case, and the defendant can absolve them from sin. If it is one of the doctrines of the Catholic church that one of the members may swear falsely as a witness, and the priest can forgive him his sin for such false swearing, so as to absolve him from all moral guilt, it is the privilege and the duty of the jury to take this fact in determining the credibility of such witnesses." The defendant's attorney here objected to this line of argument, on the ground that there was no evidence before the jury as to what the doctrine of the Catholic church is; to which the court replied: "An objection is sustained to any declaration of plaintiff's counsel indicating what is the doctrine of the Catholic church, as there is no evidence authorizing it." Plaintiff's counsel replied: "I did not say that was the doctrine of the Catholic church, but was arguing that if it was the doctrine of the church, the jury should consider the fact to discredit the defendant's witnesses. The defendant is here, and if it is not the doctrine of the Catholic church, let him stand up here and deny it, and that shall be the end of it." The court then stopped him, saying: "A theological inquiry or discussion of that kind cannot be tolerated, and if it is important, you and the defendant must settle the fact elsewhere; you must proceed to discuss some other branch of the

case." The supreme court, although approving of the conduct of the trial court in the matter, held that there ought to be a new trial; and in commenting upon the conduct of the plaintiff's attorney, said: "If the first departure of counsel might have been rendered harmless, the second outbreak could not have been inadvertent, but was without any excuse; and it can only be regarded as a purposed violation of the admonition of the court, and an attempt to gain an advantage in a court of justice by a known wrong. If it must be allowed that such a going outside of the facts for the purpose of appealing to prejudice ought not to have weight in the determination of any matter, it deserves the strongest condemnation when resorted to for the purpose of influencing the verdict of a jury; and when counsel make such departures, it must be understood that they do so at the risk of losing any advantage thereby gotten." In *Brow v. State*, 103 Ind. 133, the prosecuting attorney said "he knew personally the saloon-keeper in this case, and that he was guilty of this, and he was sure of other crimes." This was held to be sufficient to justify a reversal, the court having refused to instruct the jury to disregard improper matters outside of the record. In *People v. Dane*, 59 Mich. 550, the prosecuting attorney said "he knew that the defendant was the man who took the money." And this was held to be sufficient ground for reversing the judgment. In *Scripps v. Reilly*, 35 Id. 371, 24 Am. Rep. 575, the judge, at the trial, permitted counsel, in opening the case, to read, against objection, papers not admissible in evidence, and which were not afterwards offered in evidence. This was held to be such an abuse of discretion as to require the granting of a new trial; and it was further held that the error was not cured by a subsequent instruction to the jury to disregard said papers. In *Martin v. Orndorff*, 22 Iowa, 504, the counsel were permitted to read and comment upon testimony taken at a former trial between the same parties; and this was held to be error sufficient to call for a reversal, and that the error was not cured by a charge to the jury not to consider said testimony. In *Martin v. State*, 63 Miss. 505, 56 Am. Rep. 812, the prosecuting attorney said to the jury: "Martin, the defendant, is a man of bad, dangerous, and desperate character; but I am not afraid to denounce the butcher-boy, although I may, on returning to my home, find it in ashes over the heads of my defenseless wife and children." No objection was made to the use of this language, and the trial court did not interfere. The supreme court held that it was the duty of the presiding judge to interfere, in such a case, of his own motion, and granted the defendant a new trial. In *Perkins v. Burley*, 64 N. H. 524, counsel for the prevailing party, in his closing argument, said to the jury, that if they knew how the plaintiff and his father and brother (who were witnesses for him) were regarded in the vicinity in which they lived, he would be willing to submit the case without argument. This was held to be sufficient ground for setting aside the verdict. In *Baldwin v. Grand Trunk R'y Co.*, 64 Id. 27, plaintiff's counsel told the jury that a Texas jury had given a verdict for ten thousand dollars in a similar case, and that another jury had given a verdict for eight thousand or ten thousand dollars against this defendant in another case. This was held to be error, and not to have been cured by the fact that the statement was made in an altercation begun by defendant's counsel. In *Reich v. Mayor etc. of New York*, 12 Daly, 72, plaintiff's counsel attempted to read to the jury a reported case; but on objection being made, he closed the book, and stated what the case held, saying that that case was "on all fours" with the case on trial. The court declined to stop him, and it was held error. In *House v. State*, 9 Tex. App. 567, the prosecuting

attorney, in his argument to the jury, told them that "if the state of Texas had an assistant attorney-general worth a cent, this cause would not have been reversed on a former appeal; and if there should be a conviction of defendant this time, he would see that a correct statement of facts went up on the next appeal, and that the court of appeals would affirm the verdict." The court of appeals severely reprimanded counsel, and reversed the judgment.

In *Grosce v. State*, 11 Tex. App. 377, Hurt, J., delivering the opinion, said: "The eighth bill informs us that the district attorney in the case stated to the jury, over the objections of defendant, that 'he heard, while out on the street in New Braunfels, a citizen remark that it was a great shame that the defendant should have taken the money of the old man Wucherer, near seventy-one years old, and all the money he had in the world.' The court overruled the defendant's objections, and allowed the district attorney to repeat these remarks, and gives this explanation: 'The district attorney used the remarks by way of argument, and the facts were testified to besides, — that is, that Wucherer was seventy-one years old, and it was all the money he had.' We cannot understand how these remarks could be termed (as applicable to a legal trial) argument. An argument, it is true, is 'a reason offered in proof, to induce belief or convince the mind.' A person on the street believed that defendant stole an old man's money, and thinks it a shame; therefore the minds of the jurors should be convinced that defendant is guilty. If this is legitimate, the crowd, which in some cases is a mob, should be consulted, and its decisions reported to the jury, and the verdict should be rendered by this outside tribunal, if approaching unanimity, and be substituted for that of the jury. Who would be willing thus to be tried? or who would be willing for a jury to pass upon his guilt, their minds being first filled with the opinions of the streets, frequently manufactured by ignorance or prejudice, if not malice? This would not be a trial, but a seriously solemn mockery of the same. A citizen is vouchsafed a fair and impartial trial by a jury of twelve men. Rules are given by which the jurors are tested, under oath, touching their relationship, prejudices, and opinions. When an impartial jury is impaneled, the guilt of the accused is tried under the law and evidence. The evidence consists of facts sworn to by witnesses. The witnesses must confront the accused. Hearsay evidence (facts) is not admissible; neither, *a fortiori*, are street opinions. The fact that there was evidence that the prosecutor was aged, and that he lost all of his money, had no connection with nor could it justify the allusion to outside opinions. The court should have promptly stopped the district attorney, and informed the jury that they should disregard these opinions, and try the defendant by the facts sworn to by the witnesses." In *Conn v. State*, 11 Tex. App. 399, the district attorney, in his argument to the jury, said: "They have severed, and Conn is put on trial, and you are told that he is only a hired hand. They hope thus to clear this man, and then he is to swear his confederate clear. I tell you this is the trick." Counsel for defendant objected to these statements, and asked the court to stop the district attorney, but the court refused to do so. The district attorney continued: "Good men in this county, and the best men in Gonzales County, desire the conviction of this man and his partner." To the defendant's objections to these remarks, the court responded: "He speaks at his peril; I will sign your bill of exceptions." Hurt, J., in delivering the opinion of the court of appeals, said: "Collins had the right to place Conn on trial first, and if acquitted, make a witness of him. This is not only permitted by the code, but is in perfect

accord with reason and justice; and the judge should not have permitted for a moment an attack such as the above upon proceedings which are not only just but expressly authorized by the very code of laws for a supposed breach of which the defendant was being tried. If to place Conn on trial first, with a view of acquittal, and to make him a witness, be a trick, it is one expressly provided for by law. If Conn be guilty, the state should defeat the trick by proving his guilt under the rules of law. This response of the judge is astonishing indeed. Considering the very obnoxious and flagrant remarks of the district attorney, we cannot conceive how it were possible for any person save defendant to be in peril. That the district attorney was not, is very evident from the fact that defendant's motion for a new trial was promptly overruled. We are left to conclude from the latter part of the remark, to wit, 'I will sign your bill of exceptions,' that the danger or peril was to be from the hands of this court; if so, we are equal to the occasion; for we will not permit one accused of theft or any other offense to be convicted by such means, though all the good, better, or best men of this state desire his conviction."

In *Lawbach v. State*, 12 Tex. App. 583, while the district attorney was making his closing speech, the accused spoke up and said: "If I had the witnesses Tom and Hub Fennel, I could show about it." Whereupon the district attorney said to the jury: "The brother of these men told me if they were here, their testimony would be against you." Upon objection being made to his making these remarks, he told the jury not to regard anything he or defendant had said. At the close of his argument, he sought to correct the error by asking the court to give this charge to the jury: "The jury, in their deliberation in this cause, should not, in finding their verdict, be influenced for or against the defendant by any argument or remarks made either by the counsel for the defendant or the state, but must be governed solely by the law as given them by the court, and the facts testified to by the witnesses on the stand." But Willson, J., delivering the opinion of the court of appeals, said: "We think this came too late to remedy the evil, and that, furthermore, it was an improper instruction. We do not understand that the jury are to disregard argument. The law provides for argument, and it is one of the most effectual means known to the law of arriving at the truth. If a jury is to be uninfluenced by argument, then why have argument? It would be wise to forbid it, and thus save much valuable time. If the district attorney had requested the court to instruct the jury that he had committed an error in stating to them what had been told him by a brother of the absent witnesses Fennel, and that they must disregard his remarks upon this subject, and not suffer their minds to be in the least influenced thereby, it would at least have been a partial reparation of the wrong; but the charge which was given at his instance was, we think, better calculated to intensify than to palliate the error." In *Sasse v. State*, 68 Wis. 530, the district attorney, addressing the jury, said: "The defendant committed a crime in the old country, — in Germany, — and he fled from justice. He engaged passage in one ship and then in another. He landed in this country, and went to Philadelphia, committing a crime there. He admitted that he knocked a hole in a man's head in the old country, and, by his admission, fled and committed a crime in Philadelphia, — a crime on one of the citizens of this country." Defendant's counsel objected to these remarks, but the trial court overruled his objection, saying: "I suppose the previous history of the defendant may be given, but the fact that he committed one crime is no evidence that he committed this. The court permits the district attorney

to proceed as far as to state the previous history of the defendant, with the suggestion, however, that because he committed one crime, it is no evidence that he committed the crime of which he now stands charged." The district attorney proceeded: "He assumed another man's name; he obtained money under false pretenses, and told how he came to commit the crime before stated." And he repeated the remark that the defendant had knocked a hole in a man's head. To all of which the defendant excepted. In charging the jury, the trial court said: "You will not regard any statement of counsel that the defendant committed a crime in Germany, or that he was a fugitive from justice, or that he came here under an assumed name, all of which things are not in the case." The supreme court held that these remarks of the district attorney were highly improper; that the remarks of the trial judge came very near sanctioning the charge made by the district attorney, or taking it as true, and said: "For these very objectionable remarks of the district attorney, so approved by the court, we are compelled to reverse the judgment of conviction in this case, and order a new trial."

2. COMMENT BY COUNSEL ON TESTIMONY OFFERED AND EXCLUDED as incompetent and illegal cannot be allowed, and if objected to and not checked, or if persisted in after being checked by the court, will be sufficient ground for reversing the judgment: *Sullivan v. State*, 66 Ala. 48; *Marble v. Walters*, 19 Mo. App. 134; *Cleveland Paper Co. v. Banks*, 15 Neb. 20; 48 Am. Rep. 334; *Koelges v. Guardian L. I. Co.*, 57 N. Y. 638; *Clark v. State*, 23 Tex. App. 260.

3. UNDIGNIFIED AND UNCALLED-FOR PERSONAL ABUSE BY COUNSEL IN ARGUMENT, of the accused, or of witnesses, or of jurors, calculated to inflame the passions of the jury, and to materially prejudice the accused in the trial, is sufficient to call for a reversal of the judgment: *Bessette v. State*, 101 Ind. 85; *Bedford v. Penny*, 58 Mich. 424; *State v. Williams*, 65 N. C. 505; *State v. Smith*, 75 Id. 306; *State v. Noland*, 85 Id. 576; *Ricks v. State*, 19 Tex. App. 308; *Stone v. State*, 22 Id. 185. In *Bessette v. State*, 101 Ind. 85, the prosecuting attorney, in addressing the jury, said of the defendant: "Luke Bessette has a bad-looking face; I ask you to just look at his face; you have a right to look at his face, and I have the right to ask you to look at his face, and as prosecuting attorney I have a right to comment upon it; if his face does not show him to be a bad man, then I am not a good judge of the human countenance." In the course of his argument to the jury, he further said: "The defense has already succeeded, perhaps, in making a young man on the jury believe that this is a blackmailing scheme. I think I know who he is, and I think he has become greatly impressed with that theory." The supreme court granted the prisoner a new trial. The court, after severely criticising the conduct of the prosecuting attorney in referring to the personal appearance of the accused as he had done, said: "The personal allusion made to the probable state of mind of one of the jurors was yet more reprehensible. To be thus singled out from his fellow-jurors, and put under surveillance, was well calculated to impair the independence of mind and judgment which it was the right and duty of the juror to maintain until convinced by the evidence and the fair and legitimate argument of counsel." In *State v. Williams*, 65 N. C. 505, the counsel said: "Will you give a verdict upon the evidence of this Pennsylvania Yankee, — this Rich Square grog-shop keeper?" In *State v. Smith*, 75 N. C. 306, the language employed by counsel was as follows: "The bold, brazen-faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me that if I did he would get the legislature to impeach me." In *State*

v. *Noland*, 85 N. C. 576, the prosecuting attorney, in his argument, declared that two of the jurors in the case had gone into the box with souls blackened with perjury and bribery." He also walked over to the jury-box and stepped on the foot of one of the jurors, saying after he had done so, "Beg pardon, I wanted to wake you up." The juror was not asleep, nor did he appear to be so. The supreme court granted a new trial for the misconduct of the counsel. In *Ricks v. State*, 19 Tex. App. 308, the district attorney, in his argument to the jury, said: "The witnesses for the defense have sworn lies, and have come here for that purpose. I will show it by the testimony. They know that they have sworn lies, and if it was not so they would not allow me to say it, but would make mince-meat out of me when I charge them with having done so." Hurt, J., in delivering the opinion of the court of appeals, said: "We deem it proper—yea, an imperative duty on our part—to sternly and emphatically condemn such conduct. Such bullying and defiant conduct was highly calculated to provoke the most serious results; and that, too, in the very temple of justice; a place in which the highest order and decorum should be preserved."

In *Stone v. State*, 22 Tex. App. 185, the prosecuting officer, in his address to the jury, said: "This defendant, I. L. Stone, is a contemptible and pusillanimous puppy. He comes into this court with the swaggering insolence of a grocery bully, and pleads not guilty to this charge. During the hours of night, while his family were at their humble home shedding tears of regret over the sad downfall of the husband and father, this man, this biped, I. L. Stone, is bedding up with these prostitutes. Had I the command of language to stand here and express my contempt of this thing, this I. L. Stone, I could stand until the dawn of the resurrection day, and then say less than he merits. If I were going to establish a hell on earth, and invade the realms of darkness for one to supervise it, I would leave there and come back here, and take I. L. Stone, for he is a fair representative of the Devil." In reference to this language the court said: "Such language was uncalled for and highly reprehensible. It was not argument, nor a discussion of the evidence. It was a personal and undignified abuse of the accused, such as should never be tolerated in a court of justice. It was calculated to arouse the passions of the jury against the defendant, and to materially prejudice him in the trial. It was such error in the proceedings as would of itself cause a reversal of the judgment." In *Anderson v. State*, 104 Ind. 407, the prosecuting attorney, in his opening statement, called the accused "a dirty dog." The supreme court characterized this conduct as highly improper, but did not consider it sufficient ground, under the circumstances of that case, for reversing the judgment.

4. LANGUAGE CALCULATED TO HUMILIATE AND DEGRADE DEFENDANT in the eyes of the jury and by-standers, particularly when he has not been impeached, cannot be permitted on the part of counsel, and where it is not checked, or where it is persisted in after warning from the court, it will be ground for granting a new trial: *Coble v. Coble*, 79 N. C. 589; 28 Am. Rep. 338; *Hatch v. State*, 8 Tex. App. 416; 34 Am. Rep. 751. In *Coble v. Coble*, *supra*, the plaintiff's counsel, in his closing address, to the jury said: "That no man who had lived in defendant's neighborhood could have anything but a bad character; that defendant had polluted everything near him, or that he touched; that he was like the upas-tree, shedding pestilence all around him." Bynum, J., in delivering the opinion of the court, said: "Such an assault is no part of the privilege of counsel, and was well calculated to influence the verdict of the jury. The defendant's counsel interposed his objections in apt

time and upon the instant, but they met with no response from the court, and for this error there must be a *venire de novo*."

5. OMISSION OF DEFENDANT TO TESTIFY IN HIS OWN BEHALF MUST NOT BE COMMENTED UPON by the opposing counsel in his argument to the jury, and if counsel does comment upon such omission, and the court, upon objection made, refuses to stop such comment, or declines to instruct the jury to disregard such comment, the judgment will be reversed: *People v. Tyler*, 36 Cal. 522; *Long v. State*, 56 Ind. 182; 26 Am. Rep. 19; *Commonwealth v. Scott*, 123 Mass. 239; 25 Am. Rep. 87; *Devries v. Phillips*, 63 N. C. 53; *Gregg v. Wagner*, 77 Id. 246; *Crandall v. People*, 2 Lans. 309; but see *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121, in which the counsel for the state, having been contradicted by the accused during his argument to the jury, turned to him and said: "Mr. Calkins, you had an opportunity to testify in this case and did not do so." This was held not to be sufficient ground for a new trial. Brinkerhoff, J., delivering the opinion of the court, said: "The prisoner seems to have provoked the single hasty retort of counsel, and the court does not appear to have been in any way wanting in duty." In *Long v. State*, *supra*, the language employed by counsel was this: "The evidence in this case is not as clear as it might be. There were but two parties to this transaction. You have heard the evidence of one of them. We would have been pleased to have heard from the other, to see what light he could have thrown upon this transaction." This was held to be sufficient to call for a reversal of the judgment. But the Indiana statute expressly provides that "if the defendant do not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause." Niblack, J., delivering the opinion of the court, said: "We construe the statute to mean, that when a defendant in a criminal cause declines to testify in his own behalf, absolute silence on the subject is enjoined on counsel in their argument on the trial." It was held, in that case, that the error was not cured by the fact that the court checked the attorney, and instructed the jury to disregard what he had said. In *Commonwealth v. Scott*, *supra*, the trial judge ruled that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not testifying in their own behalf, and also to give the reasons which the prosecution contended really existed for their not testifying; but the supreme court held that in so doing he committed an error which was manifestly prejudicial to the defendants, and which obliged it to set aside the verdict and grant a new trial. But if the accused offers himself as a witness in his own behalf, and then refuses to answer proper questions, his refusal may be commented upon by counsel, and considered by the jury. When he offers himself as a witness, he waives his privilege, and becomes subject to all the rules and tests applicable to other witnesses: *State v. Ober*, 52 N. H. 459; 13 Am. Rep. 88; Cooley on Constitutional Limitations, 3d ed., 317, note. And when the accused offers himself as a witness in his own behalf, the prosecuting attorney may, in addressing the jury, comment upon his appearance while testifying: *Huber v. State*, 57 Ind. 341; 26 Am. Rep. 57.

6. FORMER CONVICTION OF DEFENDANT MUST NOT BE ALLUDED TO IN ARGUMENT by counsel, where such conviction has been set aside on appeal and a new trial granted: *Hatch v. State*, 8 Tex. App. 416; 34 Am. Rep. 751; *House v. State*, 9 Tex. App. 567; *Moore v. State*, 21 Id. 666. In *Hatch v. State*, *supra*, the prosecuting attorney, in his argument to the jury, said that the defendant, who had been previously convicted, had obtained a new trial "by a dodge and technicality, and added: "I will, as often on a new trial as I can get the case before twelve honest men, convict him again and again." The Texas

statute expressly provides that "the former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." For the misconduct of counsel stated above the judgment was reversed, although the trial judge reproved counsel and called him to order, directing him to speak to the evidence in the case, and further directed the jury to disregard any and all statements made by counsel except as the same related to the evidence, or such as were the deductions drawn from the evidence in the case. In *Moore v. State, supra*, the prosecuting attorney said to the jury: "A good jury of your county convicted the defendant of the offense with which he is now charged, upon a former and a previous indictment, and his attorneys appealed it to the court of appeals upon a trifling technicality in drawing the indictment; and that court reversed the case, and by taking advantage of this trifling technicality, without merit, he has caused your county great expense, which comes out of the pocket of every good tax-payer, yourselves among the rest; and now, in view of these facts, I ask you to give him such a term in the penitentiary that will make up for this great expense he has caused upon a mere technicality." In reversing the judgment, the court of appeals said: "We can only reverse and remand the case, in the hope that the accused may secure a fair and impartial trial, according to law and according to those methods, alike ancient and honorable, which still obtain in all enlightened courts." In *Goldman v. Wolff*, 6 Mo. App. 490, it was held to be very improper for counsel, in his argument to the jury, to state the amount of a former verdict rendered in the case, but that where the court rules that such remark is improper, the misconduct will not be sufficient to justify a reversal of the judgment. In *Lamar v. State*, 65 Miss. 93, the prosecuting attorney told the jury that on a former trial of the defendant the jury were not out more than a minute when they returned a verdict of guilty against him. This was held to be highly improper, but as the defendant was found guilty on his own testimony, the verdict was not disturbed.

7. FACT THAT CHANGE OF VENUE HAS BEEN HAD MUST NOT BE COMMENTED UPON by counsel in argument to the jury. And if such comment be made, and not checked by the court, or if it be persisted in after being reproved by the court, it will be sufficient ground for reversing the judgment: *Campbell v. Maher*, 105 Ind. 383; *Carter v. Carter*, 101 Id. 450; *Devries v. Phillips*, 63 N. C. 53; *State v. Smith*, 75 Id. 306. In the case last cited, the prosecuting attorney said: "The defendant was such a scoundrel that he was compelled to move his trial from Jones County to a county where he was not known." This was held to be highly improper. But if the counsel at once desist, and the court instructs the jury that the change of venue has nothing to do with the case, and that they should not consider it in reaching their verdict, the error will be considered cured: *Carter v. Carter*, 101 Ind. 450.

8. APPEALS TO LOCAL PREJUDICES, or to prejudices foreign to the case in evidence, are highly improper in the argument of counsel to the jury, and may be good ground for reversing the judgment: *Gibson v. Zeibig*, 24 Mo. App. 65; *Newton v. State*, 21 Fla. 53; *Combs v. State*, 75 Ind. 215; *Bremmer v. Green Bay etc. R. R. Co.*, 61 Wis. 114. In *Gibson v. Zeibig, supra*, counsel said: "I take it, gentlemen, that all this matter amounts to is a little difference between St. Louis and Chicago; and I think you will decide (or find) that in this case (or this time) we of St. Louis rather got the best of Chicago." Thompson, J., in delivering the opinion of the court, said: "An appeal of this kind to local prejudice and local pride should not have been made. It was a matter wholly extrinsic to the evidence and to the merits of the case. The court should have checked counsel of its own motion, and

instructed the jury to disregard such considerations. This was the least that the plaintiff was entitled to under the circumstances. But when the plaintiff's counsel objected to this line of argument, and the court overruled the objection in the presence of the jury, the effect of the ruling must have been to impress the jury that this line of argument met with the deliberate approval of the court." But in *Dowdell v. Wilcox*, 64 Iowa, 724, it was held that great latitude should be allowed to counsel in argument in appealing to the sympathies of a jury, and that the trial court did not abuse its discretion in allowing plaintiff's counsel to appeal to the jury in her behalf as a soldier's widow, and in denouncing her opponents as leeches and oppressors of poor women and widows, although the plaintiff, while such appeal was being made, sat in front of the jury weeping, or pretending to weep.

9. TO TELL JURY THAT WRONGFUL CONVICTION OF ACCUSED MAY BE RIGHTED BY APPEAL to the supreme court is sufficient ground for reversing a judgment of conviction. Such a statement made by counsel in his argument to the jury is calculated to induce them to disregard their responsibility, and ought not to be permitted: *State v. Kring*, 64 Mo. 591.

The foregoing rules, with the illustrations given, will assist in determining what arguments and allusions of counsel are so seriously improper as to call for a reversal of the judgment.

MISCONDUCT OF COUNSEL IN ARGUMENT, WHEN AND HOW CURED. — It is not every indiscreet remark of counsel in argument that will justify a reversal or be ground for a new trial: *State v. Guy*, 69 Mo. 430. The language used in that case is as follows: "The defendant could have told the truth just as well before he consulted counsel as he could afterward." This was held to be not sufficient ground for reversal. In the nature of things much must be left to the discretion of the court in determining, in view of all the circumstances of the case, whether or not a new trial should be granted: *George v. Swafford*, Sup. Ct. Iowa, October, 1888; *State v. Hamilton*, 55 Mo. 520; *Thompson v. Bartley*, 27 Pa. St. 263; *Larkins v. Tarter*, 3 Sneed, 681. To justify a reversal of the judgment, it must appear that the substantial rights of the party against whom it was rendered were prejudiced by the misconduct: *Shular v. State*, 105 Ind. 289; *Boyle v. State*, 105 Id. 469; *Porter v. Throop*, 47 Mich. 313; *State v. Robertson*, 26 S. C. 117. If the trial was, in all other respects, fairly conducted, and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury, the verdict will not be set aside: *State v. Zumbunson*, 7 Mo. App. 526; *Lamar v. State*, 65 Miss. 93. And in *East Tenn. etc. R. R. Co. v. Gurley*, 12 Lea, 46, it was held that an improper remark of counsel in discussing the question of punitive damages was not sufficient ground for granting a new trial, where all consideration of punitive damages was excluded by the judge in charging the jury. Improper remarks of counsel provoked by like remarks of opposing counsel, or called forth in reply to such remarks, are not generally regarded as calling for a reversal: *Keyser v. Chicago etc. R'y Co.*, Sup. Ct. Mich. June, 1887; *Jenkins v. North Carolina Ore Dressing Co.*, 65 N. C. 563; *Rea v. Harrington*, 58 Vt. 181.

Where an attorney who has made improper remarks in his argument to the jury, when called to order, admits his error, and immediately desists, or when the court, upon objection made, rules out the objectionable remarks, and instructs the jury to disregard them in making up their verdict, the great weight of authority holds that the mischief is thereby remedied, and that a new trial ought not, in such cases, to be granted: *Wightman v. City of Providence*, 1 Cliff. 524; *Little Rock etc. R'y Co. v. Cavenesse*, 48 Ark. 106;

People v. Lee Ah Yute, 60 Cal. 95; *Denver etc. R. R. Co. v. Moynahan*, 8 Col. 56; *Kennedy v. People*, 40 Ill. 488; *Feliz v. Scharncober*, 119 Id. 445; *City of Evansville v. Wilter*, 86 Ind. 414; *Epps v. State*, 102 Id. 539; *Norton v. State*, 106 Id. 163; *Perkins v. Guy*, 55 Miss. 153; *Cavanah v. State*, 56 Id. 299; *State v. Braswell*, 82 N. C. 693; *Hinton v. Cream City Co.*, 65 Wis. 323. Battle, J., in delivering the opinion of the court in *Little Rock etc. R'y Co. v. Cavenesse*, 48 Ark. 132, said: "But the court in this case having admonished the attorney that the statement made by him was improper, and told the jury that they should entirely disregard it, and the attorney himself having said to the jury that his statement was not evidence, but was only made by way of argument, and that they should not consider it in any other light, it is presumed that the mischief of the remark was counterbalanced and the appellant was not prejudiced thereby. Under the circumstances, it is no ground for reversal." But in *Hall v. Wolf*, 61 Iowa, 559, where counsel, in addressing the jury in the absence of the trial judge, stated as facts and commented upon matters not in evidence, and calculated to work prejudice to the adverse party, such misconduct, though not objected to at the time, was held to be good ground for granting a new trial. The great weight of authority, however, holds that the misconduct of counsel in making improper statements in argument must be pointed out and exceptions taken thereto in order to make it available as a ground for a new trial: *Fredericks v. Judah*, 73 Cal. 604; *Mitchum v. State*, 11 Ga. 615; *Scarborough v. State*, 46 Id. 26; *Mayo v. Walden*, 57 Id. 42; *Young v. State*, 65 Id. 525; *Turner v. State*, 70 Id. 765; *Gillooley v. State*, 58 Ind. 182; *State v. McCool*, 34 Kan. 617; *Bedford v. Penney*, 65 Mich. 667; *State v. Degonia*, 69 Mo. 485; *Bradshaw v. State*, 17 Neb. 147; *McLain v. State*, 18 Id. 154; *Bullis v. Drake*, 20 Id. 167; *Chandler v. Thompson*, 30 Fed. Rep. 38.

CRIMINAL LAW — JURY TRIAL. — EVERY PERSON PROSECUTED FOR A CRIME HAS A constitutional right of trial by jury, and no valid law can be enacted which shall take away this right or interpose such impediments to its exercise as to unnecessarily or unreasonably impair it: *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 325. Right of trial by jury must be preserved inviolate: *Scudder v. Trenton Del. F. Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756. All issues of fact must be tried by jury, if the party desires to have them so tried: *Scott v. Nichols*, 27 Miss. 94; 61 Am. Dec. 503.

JURY TRIALS. — STATEMENTS BY COUNSEL IN OPENING TO THE JURY, SHOWING THE BEARING of facts admissible under the issue and expected to be proved, and how the issues are naturally affected by such facts, and illustrating the relation of the facts, and showing what must be the final outcome, however strong and forcibly presented, and however much calculated to appeal to the feelings, reason, or judgment, are proper; but statements in the opening to the jury, wholly inadmissible under the issue, or statements in the closing, admissible under the issue, but not proved, are improper: *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554. The trial court has a discretion in regulating the conduct of counsel in arguments, which will not be interfered with by the appellate court unless counsel are permitted, against objection, to make or persevere in improper remarks: *Sidekum v. Wabash etc. R'y Co.*, 93 Mo. 400; 3 Am. St. Rep. 549, and note 557; *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9; 5 Am. St. Rep. 483.

CRIMINAL LAW — CONSPIRACY. — THE PROSECUTION MAY FIRST PROVE CONSPIRACY ITSELF, or it may first prove the acts of different persons, thus proving a conspiracy: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note 489. An overt act, criminal in itself, may be shown to prove the existence of a conspiracy: Note to *Spies v. People*, 3 Am. St. Rep. 483.

PERIN v. PARKER.

[128 ILLINOIS, 201.]

WAIVER IS INTENTIONAL RELINQUISHMENT OF KNOWN RIGHT. If a person acquainted with the custom and usage of the Chicago Board of Trade employs a broker to sell on the board for him a lot of corn for future delivery, the broker at the time neither demanding nor waiving his right to demand margins from him in case the exigencies of the business should make it expedient to do so; and if, on an advance in the price of corn, the broker demands of his principal a margin of three thousand five hundred dollars to make him safe, which the principal refuses to advance, saying that he would pay the losses when the differences should be adjusted, and not before; and if, the price of corn still advancing, the broker makes two other demands for still higher margins, which being refused, he purchases the corn to fill his contracts, and sues his principal for the money paid for his use in making the purchase, these successive demands are not so inconsistent that the last will be held, as a matter of law, a waiver of all the previous demands.

WHERE PARTY CALLED UPON FOR MARGINS REFUSES TO PAY THEM, stating to his broker that he would furnish no margins until differences were settled or determined, he will be precluded from afterwards objecting that the demands were not sufficiently definite, and that some of them were for a larger amount than the broker was entitled to ask for.

BROKER IS BOUND TO USE DILIGENCE TO PREVENT LOSS TO HIMSELF AND HIS PRINCIPAL, by buying corn to meet his contract, when, by the latter's order, he buys corn for future delivery, if the principal gives him absolute and unconditional notice that he will not pay the margins demanded from him; but where the principal merely notifies the broker that he will not pay losses until the differences are adjusted, such notice is not to be regarded as an absolute and unconditional refusal, and the broker may buy the corn necessary to fill the contract at any time before he is bound to deliver, and hold the principal liable for the loss.

PAYMENT OF MONEY BY ONE PERSON UNDER INDEMNITY FOR ANOTHER is, in general, equivalent to a payment made at the latter's request, the indemnity operating as a request. Where, therefore, a broker, employed by his principal to make sales of corn for future delivery, in a market whose rules, known to the principal, require the seller to advance margins on the price, sells the corn, and upon a rise in the price, after making a proper demand for the margins, which is refused, buys the corn necessary to fill his contract, the difference in price between the corn sold and that purchased becomes a debt recoverable, with interest, against the principal upon the common money counts, as money advanced by him to the principal's use, at his request.

ERROR IN INSTRUCTIONS BECOMES ENTIRELY IMMATERIAL in a case where the defendant merely stands upon the general issue, without pretending to make any other defense, and the plaintiff, by competent evidence wholly uncontradicted, establishes his right to recover the whole amount, which he does recover.

MARGINS, AMOUNT OF, UPON WHAT BASED. — Where the rules of a particular market authorize a broker selling corn for future delivery to demand ten per cent margins of his principal, an instruction to the jury which, by necessary implication, excludes from its consideration, in considering

the reasonableness of the broker's demand for margins, the right of the broker to demand ten per cent margins on the contract price, and limits his right to margins based upon the difference between the contract price and the market price, is erroneous, and properly refused.

REASONABLENESS OF DEMANDS FOR MARGINS A QUESTION OF FACT. — In an action by a broker to recover moneys advanced to complete his contract of sales made for his principal, the question whether the demands of the broker for margins were reasonable is a question of fact, to be determined by the jury from the statements in the written demand and their context, and from a consideration of all the surrounding circumstances.

REFUSAL TO GIVE INSTRUCTION SUBSTANCE OF WHICH HAS BEEN GIVEN in other instructions is not erroneous.

ASSUMPSIT. The facts are stated in the following opinion of the appellate court, which was delivered by McAllister, J.:—

“This was an action upon the common counts in *assumpsit*, brought by Parker, a commission merchant of Chicago, doing business on the board of trade, against Perin, a resident of Cincinnati, Ohio, to recover for money advanced by the former for the latter, and commission earned, in the course of the execution by Parker of the employment of him as such merchant by Perin, December 30, 1882, to sell for the latter, upon the Chicago Board of Trade, fifty thousand bushels of corn, of which twenty-five thousand bushels were to be delivered in January, and the same quantity in May then next. Upon trial by jury, the plaintiff below had a verdict and judgment for \$6,114.28, and the defendant brings error to this court, assigning various errors, under which the most vital questions arise upon the points made by counsel for plaintiff in error,—1. That as respects the alleged advances of money, the plaintiff below failed to make out a cause of action by his evidence; 2. That what plaintiff below claimed as advances of money for the defendant at his implied request were not such in legal contemplation, and if any recovery could be had for what plaintiff below was compelled to pay out in taking care of the said contracts of sale for defendant, such recovery could only be upon a special and not upon the common counts; 3. That interest on the money so paid was not allowable. Other points for reversal were made, which will be noticed as we proceed.

“The first question, then, is as to whether the plaintiff below established, by his evidence, a cause of action as respects the money so expended. It clearly appears, from the evidence, that at the time Perin employed Parker to sell for him, on the Chicago Board of Trade, the corn in question, the former was well acquainted with the usages, customs, and methods of doing

business on that board; that no margins were asked for by Parker or furnished by Perin; and it is not pretended that anything was said or done which could be construed into a waiver of Parker's right to have Perin furnish margins, if the exigencies of the business made it expedient to do so. It appears that Parker made sale of the corn, for future delivery, immediately upon receiving the order of Perin, and in strict compliance therewith, and informed the latter that he had done so; that Parker did not have any of the corn at the time, and that from the usages of the business, with which Perin was familiar, it was to be presumed to have been within the contemplation of the parties that Parker should go upon the board of trade and buy, on Perin's account, the corn requisite to a delivery when the contracts of sale were closed up. It appears that from the time such sales were made, the price of corn continually advanced in the market, so that, by January 13, 1883, the deal was against Perin in the sum of three thousand dollars and upwards. Parker then demanded of Perin that he supply margin in the sum of three thousand five hundred dollars. The latter refused, saying that he would pay losses when differences were settled or determined, and not before. He put such refusal solely upon the ground that Parker had been ordered, January 4, 1883, to buy in the corn for January delivery, and had violated his duty in that respect. That claim was shown to have been entirely without foundation. January 15th, Parker made another demand on Perin for four thousand dollars margins, by draft, which the latter refused to accept. Then Parker went to Cincinnati, and January 16th had two personal interviews with him, and there asked him again for margins, and Perin peremptorily refused, assigning for a reason the said baseless claim that Perin had violated his duty in failing to buy in the corn for January delivery. Then, January 18th, Parker, by telegram from Chicago, demanded six thousand dollars, to be sent by telegram by 12:30 o'clock of that day, and gave him notice that if this demand was not complied with, he should buy in the corn for Perin's account. That telegram was not received by Perin until 12:15, and then it was impracticable for him to comply. He did not, and he does not, pretend that he would if it had been received in time. On the contrary, the evidence tends to show that he at no time afterward intended to retract the notice he gave Parker January 13th, that he should pay no losses until differences were settled or determined.

“When this case was before us upon a former writ of error (*Perin v. Parker*, 17 Bradw. 169), we held that upon the undisputed facts, the notice and demand of January 18th were not reasonable; that such being the case, it should have been submitted to a jury to determine whether or not Parker, by his acts and words, had waived his rights upon his previous demands for margins, and whether or not Perin had, before said last demand, retracted his notice to Parker that he would not supply any. The judgment in Parker’s favor was reversed, and the cause went back for a second trial. Upon this last trial those questions were specifically submitted to the jury,—as to the waiver, by requests to find specially; as to the retraction, by instruction asked on behalf of defendant. The jury found, by their special verdict, that there was no waiver, and by their general verdict, that there was no retraction of said notice of refusal to put up margins. It is contended by counsel for Perin that the special finding of the jury, that there was no waiver by Parker of any of the demands for margins made by him prior to that of January 18th, is unsupported by the evidence,—that they were respectively insufficient if not waived.

“A waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it: *Horie v. Insurance Co.*, 32 Conn. 40; *Lewis v. Insurance Co.*, 44 Id. 72; *West v. Platt*, 127 Mass. 372. A subsequent demand is not necessarily a waiver of a prior one: *Hull v. Hobart*, 16 Me. 164. The fact that each successive demand made by Parker was for an amount larger than that of the next preceding one cannot be considered as of controlling effect, because such increase of amount was properly due to the fact that the market price of corn was advancing from day to day. In view of that circumstance, the successive demands were not so inconsistent as to require the jury to find, or this court to adjudge, that the last was a waiver of all the previous demands.

“But counsel for Perin now insist that the several notices or demands were not sufficiently definite, and that some of them were for a larger amount than he was entitled to ask for. Even if that were so, having decided that he would furnish no margins until differences were settled or determined, and so notified Parker, he was precluded from taking advantage of such objections at the trial.

“It is also urged by counsel that it was the duty of Parker

to have bought in the corn within a reasonable time after receiving the notice of refusal by Perin, — January 13th, — and thus prevented the subsequent increase of loss. We are inclined to the opinion that if the notice had been absolute and unconditional, it would, upon settled principles of the law of principal and agent, have been the duty of Parker to use due diligence to prevent such increase of loss to himself and his principal. But the notice as given cannot be so regarded.

“The next question is, whether the money paid by Parker in buying in the corn in question can be regarded as money advanced upon the implied request of Perin, and so become a debt recoverable under the common-money counts. The rule applicable to such a case as this is the rule which pervades the whole law of principal and agent, viz., that the principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him: *Taylor v. Stray*, 2 Com. B., N. S., 195; *Leake on Contracts*, 55. It is said by that excellent author, on the same page: ‘Where a person has paid money under an indemnity from another person, it is, in general, equivalent to a payment made at his request, the indemnity operating as a request’: *Brittain v. Lloyd*, 14 Mees. & W. 762; *Lewis v. Campbell*, 8 Com. B. 541; *Monle v. Garrett*, L. R. 5 Ex. 132; L. R. 7 Ex. 101; 39 L. J. Ex. 69. *Leake* (page 56) further says: ‘The employment of a broker to buy and sell shares operates as a request to make all payments required by the rules of the stock exchange, or other share market, in the course of the execution of the employment, with a promise of repayment.’ In that statement the author is supported by the following cases: *Bayley v. Wilkins*, 7 Com. B. 886; *Westropp v. Solomon*, 8 Id. 345; *Taylor v. Stray*, 2 Com. B., N. S., 195; *Smith v. Lindo*, 5 Id. 587.

“It surely needs no argument to prove that the same rules above adverted to are applicable to a case where a person employs a commission merchant to deal for him, either in buying or selling grain or other products upon the Chicago Board of Trade. The case shows that the plaintiff below acted, in buying in the corn under the circumstances shown, entirely in conformity with the rules and usages of said board of trade, with which the defendant was familiar when he employed him. What the plaintiff was compelled to pay out in doing so was, therefore, in consequence of the employment in contemplation of the parties, and must be considered as in pur-

suance of the authority conferred by such employment, for which payment the defendant had impliedly promised to indemnify the plaintiff. The sums so paid out by the plaintiff, therefore, became a debt, recoverable against the defendant, upon the common money counts, as money advanced by the plaintiff to the use of the defendant, at his request; and that being so, the plaintiff was entitled to interest upon it, under section 2 of the statute concerning interest.

"Counsel for defendant below complain of error in the instructions to the jury. We do not deem it our duty to enter upon a discussion of the points specified by counsel, for in this case the plaintiff clearly established his right to recover the full amount which he did recover, not only by competent evidence, but evidence which was wholly uncontradicted. The defendant made no pretense of any defense but that of standing upon the general issue, and requiring the plaintiff to prove his case. That was done by undisputed testimony showing a right of recovery under settled rules of law. In such a case, we think error in the instructions becomes entirely immaterial.

"We have considered the exception taken to the action of the court in sending the jury back to supplement what they had omitted in the verdict as first returned. Under the circumstances, as shown by the bill of exceptions, we think there was no error in such action of the court.

"The judgment should be affirmed."

Dexter, Herrick, and Allen, and Horace H. Martin, for the plaintiff in error.

H. S. Munroe, for the defendant in error.

BAKER, J. We are entirely satisfied with the conclusion reached by the appellate court, and concur in and adopt the opinion filed in that court. In view, however, of the criticisms made upon that opinion in the additional brief and argument presented to this court, we will further notice some of the questions of law involved in the case.

The right of Parker to recover under the common counts, for money paid and advanced, is strenuously denied. It is evident that if Parker had carried the contracts until their maturity, he would then have been obliged to deliver the corn called for by them, and that then there would have been an implied request from Perin to him to settle the deals, and an implied promise to pay him. It is claimed, however, that

Parker being under no legal obligation to buy corn and perform the contracts before they matured, no request by Perin to him to pay out money can be implied in law, and consequently there can be no implied promise by Perin to repay it, and an action for money paid will not lie.

Parker, as agent for Perin, and acting under his orders, sold the corn for Perin, and under the rules of the Board of Trade and the custom of the Chicago market, he was personally bound to the purchasers on these contracts of sale. Parker and Perin were dealing with reference to such rules and such custom, with which they were both perfectly familiar. The rules of the Board of Trade provided that on time contracts purchasers should have the right to require of sellers ten per cent margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. The price of corn had been rapidly advancing since the date of the sales. Parker either had deposited margins upon the contracts, or was liable to be called on for the ten per cent and the additional margins by the persons to whom he had sold the corn. The evidence does not seem to disclose whether or not the purchasers had either received or called for margins. Even if they had not, yet there was an existing legal right in them to call on Parker for margins, and a legal liability upon the latter, within the next banking hour thereafter, to deposit the margins called for, and also within that time deposit with the secretary of the board, or the parties calling for such deposits, duplicate certificates of deposit, signed by the treasurer of the board or an authorized bank.

We must assume the facts to be as found by the jury in the trial court, and by the appellate court, that defendant in error had made proper demands for margins, which had never been waived, and that plaintiff in error had failed and refused to comply with these demands. After the failure of the principal to put up margins when called for, and his absolute refusal so to do, and the return, unpaid and protested, of the draft drawn therefor, it became the duty of the commission merchant to use diligence in order to prevent increase of loss to himself and his principal. It is clear that the agent was not bound himself to bear the burden and the risk of the contracts made by the express order of his defaulting principal, through the whole of the options, without power to relieve himself from the personal liability imposed upon him by the contracts.

In view of the relation of principal and agent existing between the parties, the personal liability assumed by the agent upon the contracts made, the duty of the principal to indemnify his agent, and the rules of the Board of Trade, and the usage and custom of the market in which they were dealing, we must hold that when Perin ordered his agent to make the contracts, he not only impliedly agreed to furnish margins when demanded, but also impliedly agreed that if he failed and refused to put up margins when called for, then the agent should be authorized, without waiting for the maturity of the contracts, to buy corn for the purpose of filling such contracts. If there was such implied authority, then that authority, followed by the refusal of the principal to advance margins, was equivalent to a request to his agent to purchase immediately, or within a reasonable time, at the market price, the corn called for by the contracts, and necessarily implied a promise to pay the agent the difference in price between the corn sold and that purchased. This difference in price would properly be regarded as money paid by the agent for the use of the principal, and at his request.

This case is clearly distinguishable from *Lightfoot v. Creed*, 8 Taunt. 268. There the parties were the vendor and vendee of stock, which was not transferred in conformity with the contract. The point ruled was, that the vendee had no implied authority from the vendor to purchase other stock to the same amount, and hold him for the difference as money paid to his use, and that the plaintiff should have declared specially on the contract. Here the parties were principal and agent, and the dealings were with reference to the custom and usage of a particular market; and the employment and the subsequent conduct of the principal had the effect of a request to the agent to make the purchases when he did, with a promise to pay him the difference in prices. The claim here recovered by defendant in error was within the contemplation of the parties at the time of the employment to make the contracts of sale.

We have carefully examined the record in respect to the rulings of the court upon the instructions, and will briefly state the result of such examination.

The court refused to give the third instruction asked by plaintiff in error, but the ground was substantially covered by the seventh instruction, which was given.

The refusal of the court to give the sixth instruction was

justified by the fact that the legal principle involved in it was given to the jury in the fourth and fifth instructions, and also by the further fact that it, by necessary implication, excluded from the consideration of the jury, in considering the reasonableness of the demands for margins made by defendant in error, his right to demand ten per cent margins, based upon the contract prices, and expressly limited his right to margins predicated upon the difference between contract price and market price.

The substance of the eleventh instruction submitted to the court had already been given in both the seventh and ninth instructions.

In the thirteenth instruction, the court was asked to instruct the jury, as matter of law, that any statement by Parker in any letter or telegram to Perin, in evidence, that he, Parker, would draw a draft on Perin was not a reasonable demand for margins, and was not a reasonable notice to him to put up margins. It was a question of fact, for the jury to determine, from such statements and their context, and from a consideration of all the surrounding circumstances, whether or not the demands were reasonable. It was not error to refuse the instruction.

The fourteenth and seventeenth instructions were properly refused, and for the reason that, under the statute, defendant in error was entitled to receive interest on the moneys he had advanced for the use of plaintiff in error.

Complaint is also made of the fourth and fifth instructions for defendant in error. It is objected, that while there was evidence of waiver sufficient to go to the jury, yet said fourth instruction, in stating the hypothetical case of the plaintiff below, contained no qualification on the subject of waiver, and thereby took the question of waiver from the jury. The jury was not only very fully instructed on this question of waiver in numerous other instructions of the court, but they, in their answers to the special questions submitted to them, returned into court a special finding against plaintiff in error upon this question of waiver. The fact that they made this special finding renders it absolutely certain that they were not misled by the omission under consideration. The other objections urged to this fourth instruction are technical, and do not require particular notice.

The fifth instruction for defendant in error, in order to have been entirely accurate, should have contained the additional

words, "and if the jury further believe, from the evidence, that Parker did sell the corn"; but the plain implication from the instruction, as given, was, that the jury must believe that Parker sold the corn, and the undisputed evidence was that he did sell it. It is manifest, therefore, that the jury were not, and could not have been, misled by the instruction.

The eighth instruction for plaintiff in error was modified by the court before it was given. No complaint is made of the action of the court in refusing to give it in the form in which it was asked. Objection, however, is urged to the modification made by the court. This modification was clearly inaccurate, and was probably made through inadvertence. The inaccuracy was, however, fully obviated by the fourth, seventh, and ninth instructions given for plaintiff in error,—in fact, these latter instructions rendered the modification wholly immaterial, as they excluded from the jury any right of recovery based upon the telegram of January 18th as a reasonable demand.

Our conclusion is, that there was no manifest error in the rulings of the trial court upon the instructions, and that the jury was very fully and fairly instructed on behalf of plaintiff in error.

In our opinion, the appellate court properly affirmed the judgment of the circuit court.

Judgment affirmed.

STOCK-BROKERS AND CLIENTS. — FOR A GENERAL DISCUSSION OF THE RELATION between stock-brokers and their clients, see extended note to *Horton v. Morgan*, 75 Am. Dec. 313-326.

WAIVER IS AN INTENTIONAL RELINQUISHMENT OF A KNOWN RIGHT; and there must be a knowledge of the existence of the right, and an intention to relinquish it: *Hoxie v. Home Ins. Co.*, 32 Conn. 21; 85 Am. Dec. 240. Waiver is a question of law, and not one of fact: *Spring Garden etc. Ins. Co. v. Evans*, 9 Md. 1; 66 Am. Dec. 306; *Minor v. Edwards*, 12 Mo. 137; 49 Am. Dec. 121.

ASSUMPT. — MONEY VOLUNTARILY PAID FOR THE USE OF ANOTHER DOES NOT IMPOSE a liability on such other to repay, unless the payment was made at his request: *Kenan v. Holloway*, 16 Ala. 53; 50 Am. Dec. 162; but where one person is compelled to pay money which another is bound by law to pay, a promise by the latter is raised by law to reimburse the person paying: *Winchester v. Beardin*, 10 Humph. 247; 51 Am. Dec. 702; *Ticonic Bank v. Smiley*, 27 Me. 225; 46 Am. Dec. 593; *Turner v. Egerton*, 1 Gill & J. 430; 19 Am. Dec. 235.

ILLINOIS CENTRAL R. R. Co. v. HOUGHTON.

[126 ILLINOIS, 233.]

ADVERSE POSSESSION SUFFICIENT TO DEFEAT RIGHT OF ACTION OF HOLDER OF LEGAL TITLE must be hostile in its inception, and be so continued without interruption for the period of twenty years. It must be actual, visible, and exclusive, acquired and retained under claim of title inconsistent with that of the true owner; but it need not be under a rightful claim, nor even under a muniment of title.

ORAL DECLARATIONS OF CLAIM OF TITLE ARE NOT ESSENTIAL TO CONSTITUTE ADVERSE POSSESSION on the part of the party in possession; it is sufficient if the proof shows that he has so acted as to clearly indicate that he did claim title. Using and controlling property as owner is the ordinary mode of asserting a claim of title, and no mere words can more satisfactorily assert such a claim.

DEED OF STRIP OF LAND FOR PURPOSE OF CONSTRUCTING, MAINTAINING, AND OPERATING RAILROAD TRACK thereon conveys a right of possession exclusive and wholly inconsistent with the subsequent possession of the land, or any part of it, by the grantor or his assigns, for purposes of grazing or agriculture, or as a part of the farm to which it originally belonged, although it may not convey an estate in fee. And if such grantor and his assigns continue to use and occupy a portion of such strip of land as they use the residue of the farm, claiming to be the owners thereof, their possession is adverse, and if continued for twenty years, will bar the grantee's right to bring an action for its recovery.

EJECTMENT. The opinion states the case.

Williams and Capen, for the appellant.

A. E. De Mange, for the appellees.

BAILEY, J. This was an action of ejectment, brought by the Illinois Central Railroad Company against Stephen Houghton and James Houghton, to recover two strips of land, each fifty feet in width, the one seventy and the other eighty rods in length, being a part of section 22, township 23 north, of range 2 east, in McLean County, and adjoining the one on the east and the other on the west, the strip of land one hundred feet in width, heretofore occupied by the plaintiff as its right of way. The trial, which was had before the court without a jury, resulted in a finding and judgment in favor of the defendants, and the plaintiff brings the record to this court by appeal.

On the twenty-ninth day of April, 1852, as seems to be conceded, William Walker was the owner in fee of the eighty-acre tract which includes the two tracts in controversy. The plaintiff's proof of title consists of a deed executed by said Walker and wife, dated April 29, 1852, conveying to the plaintiff, "for the purpose of constructing, maintaining, and

operating thereon a single or double track railroad, with all its necessary appurtenances, and for all uses and purposes connected with the construction, repair, maintenance, and complete operation of said railroad, the right of way over and through said tract," said right of way to comprise land of the width of one hundred feet on each side of said railroad, to have and to hold the same to the plaintiff and its successors and assigns forever, "for all lawful uses and purposes incident to a full and indefeasible title in fee-simple, or in any way connected with the construction, preservation, occupation, and sole enjoyment of said road and lands of the width aforesaid." The deed also contained a covenant on the part of the plaintiff to erect and maintain such lawful fences as would divide the lands occupied by the plaintiff from the adjoining lands on each side, and as far as possible prevent intrusion upon or passage across the lands and railroad occupied by the plaintiff.

It appears that the plaintiff, shortly after the execution of this deed, erected substantial post and board fences so as to inclose its right of way of the width of only one hundred feet, leaving the two strips of land now in controversy outside of its fences. Walker joined his farm fences with the fences inclosing the railroad, and occupied and used said two strips of land the same as he did the residue of his farm, and the evidence tends to show that he did so, claiming to be the owner. Said land was partly under cultivation, partly in grass, and in part covered with timber, and Walker cut some of the timber, and grazed and cultivated the land not covered with timber, and continued in possession of the land as a part of his farm until November 28, 1855, at which time he conveyed it to George and James Park, said conveyance being by its terms made "subject to the right of way of the Illinois Central Railroad Company, as heretofore deeded by said party of the first part to said railroad company."

George and James Park went into possession under said deed, and used the land the same as Walker had done. James Park died, and John E. Park, his sole heir at law, conveyed his interest in the farm to George Park, by deed dated March 18, 1869. George Park continued in possession until 1871 or 1872, when he died, leaving several heirs. On the twenty-eighth day of June, 1873, the administrator of George Park sold and conveyed that portion of the farm west of the railroad to Stephen Houghton, in pursuance of an order

of the county court of McLean County; and prior to making such sale, the administrator had the land surveyed up to the railroad fence, and sold it all to Houghton by the acre. Houghton and his son James took immediate possession of the land under said deed, and have ever since been in possession of the same, claiming to own it. They have also, during the same time, been in possession of the strip of land on the east side of the railroad as tenants of the heirs of George Park, having rented that portion of the farm east of the railroad of them.

The railroad fences remained where they were originally built from 1853 down to some time in the year 1886. On several occasions during that time, fire from the railroad engines burned down portions of said fences, and also destroyed the cross-fences and crops on the land in controversy; and the plaintiff, on each occasion, rebuilt the railroad fences, and paid the adjoining proprietors the damages done upon said lands. In 1886, the plaintiff took down said railroad fences, and erected new fences fifty feet farther from its railroad track, thus entering and taking possession of the land in controversy. Stephen Houghton thereupon brought his action of forcible entry and detainer, and recovered possession of said land, and then the plaintiff brought this suit.

By the declaration, the plaintiff claims an estate in fee, and as the evidence tends only to establish the plaintiff's title to an easement in the premises sued for in the nature of a right of way, it is urged that no recovery could be had, upon the principle, that where a plaintiff claims in fee, he cannot recover a less estate. We do not deem it necessary to determine whether this rule applies, since there is another ground upon which the judgment must be affirmed which seems to us to be entirely satisfactory.

The fact is established beyond controversy that, from the time the railroad fences were built down to the date of the plaintiff's entry in 1886, a period of about thirty-three years, the defendants and the grantors through whom they derived their title were in the actual, continuous, visible, open, and exclusive possession of the land sued for; and it seems too clear for serious doubt that such possession was adverse to the plaintiff.

The deed under which the plaintiff claims required the plaintiff to erect and maintain fences dividing its right of way from the adjoining lands, and it will be presumed that the

fences were erected in pursuance of that requirement. Walker continued in possession up to the fences, claiming them as his boundary lines, and claiming to have established such lines by compromise with the plaintiff. The deed from Walker to George and James Park, it is true, was made subject to the plaintiff's right of way as deeded by Walker to the plaintiff, but they took and held possession precisely as Walker had done, up to the fences which Walker claimed as his boundary lines. Park's administrator sold the land on the west side of the railroad by metes and bounds, making the fence the boundary line, and since 1873 the defendants have been in possession of the lands on both sides of the railroad, claiming title up to the railroad fences.

To constitute an adverse possession sufficient to defeat the right of action of the party who has the legal title, the possession must be hostile in its inception, and so continued without interruption for the period of twenty years. It must be an actual, visible, and exclusive possession, acquired and retained under claim of title inconsistent with that of the true owner. It need not, however, be under a rightful claim, nor even under a muniment of title. It is enough that a party takes possession of premises claiming them as his own, and that he holds possession for the requisite length of time, with the continual assertion of ownership: *Turney v. Chamberlain*, 15 Ill. 271. It is not essential, however, that there should be proof that the party in possession made oral declarations of claim of title, but it is sufficient if the proof shows that he has so acted as to clearly indicate that he did claim title. No mere words could more satisfactorily assert a claim of title than a continued exercise of acts of ownership over the property for a period of more than twenty years. Using and controlling property as owner is the ordinary mode of asserting a claim of title, and it is, indeed, the only proof of which a claim of title to a very large proportion of property is susceptible: *James v. Indianapolis etc. R. R. Co.*, 91 Id. 554.

But it is insisted that the plaintiff's right of way being a mere easement, the fee remaining in Walker and his grantees subject to the easement, the possession of Walker and his grantees is to be regarded as being held under their title, and therefore not hostile to the plaintiff, so as to constitute it an adverse possession. To this view we are unable to yield our assent. If the right of way of a railroad company were an easement the proper enjoyment of which was consistent with

the possession and occupancy of the land by the owner of the fee, such possession and occupancy might be regarded as a mere exercise by the owner of the servient estate of his property rights, subject and in subordination to the easement. Such, however, is not the character of the easement which a railroad company acquires in the land covered by its right of way. As said in *Hazen v. Boston etc. R. R. Co.*, 2 Gray, 574, "the right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land, permanent in its nature, and practically exclusive." The same view was taken by the supreme court of Vermont in *Hurd v. Rutland etc. R. R. Co.*, 25 Vt. 116, where, in discussing the interest obtained by a railroad company in its right of way by condemnation, the court say: "If that interest is regarded as a mere servitude or easement, the land, nevertheless, becomes so far the property of the corporation that their right is exclusive in its use and possession during its existence, as much so as that of the owner or occupant of the adjoining land. Those from whom the land was taken retain no right to its use or occupation for pasturage or otherwise. The object for which it is appropriated and used is wholly inconsistent with such right on the part of the former owner, as well as with that security to themselves and safety to the public which is necessary to enable the corporation to enjoy the franchises granted by their charter." In *Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150, the same court, speaking through Mr. Chief Justice Redfield, says: "The railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose": *Troy etc. R. R. Co. v. Potter*, 42 Id. 265; 1 Am. Rep. 825; *Kansas Cent. R'y Co. v. Allen*, 22 Kan. 285; 81 Am. Rep. 190.

In *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 500, this court held that the right of way was the exclusive property of the railroad company, upon which no unauthorized person had a right to be for any purpose; and in the opinion of this court in *Chicago & Miss. R. R. Co. v. Patchin*, 16 Id. 198; 61 Am. Dec. 65, it is said: "I presume the right to the land upon which railroads are built is not strictly analogous to the easement of the public in highways, leaving the fee in the owner of

the soil, but is an absolute ownership in fee for railroad purposes."

While we are not disposed to hold that the deed from Walker to the plaintiff conveyed to the plaintiff an estate in fee in the right of way, it is clear that it conveyed an estate, which, so far as the right of possession for railroad purposes is concerned, had most of the qualities of the fee. The right of possession thereby conveyed was exclusive, and was wholly inconsistent with the subsequent possession of the land, or any part of it, by the grantor or his assigns, for purposes of grazing or agriculture, or as a part of the farm to which it originally belonged.

The possession of Walker and his assigns, being wholly inconsistent with the plaintiff's title, and having been held under a claim of title on their part, has been hostile, and has constituted an adverse possession, and such possession having been continued for more than twenty years, the plaintiff's right to bring its action for the recovery of said lands is barred by the statute. The finding of the court was therefore in accordance with the evidence, and the judgment must be affirmed.

NATURE OF EASEMENT OR RIGHT OF WAY OF RAILROADS.—In delivering the opinion of a majority of the court in *Chaplin v. Commissioners of Highways*, 126 Ill. 264, 273, Mr. Justice Bailey said: "In *Lucan v. Cadwallader*, 114 Id. 285, and *Eckhart v. Irons*, 114 Id. 469, this court held that a mere easement did not constitute a freehold estate. We are now of the opinion that those decisions were pronounced without consideration. A perpetual easement in lands, or any interest in lands in the nature of such easement, when created by grant, or by any proceeding which is in law equivalent to a grant, constitutes a freehold. A legal interest in lands is to be deemed a freehold, not because of the kind or quantity of the interest, but by reason of its sufficient legal indefinite duration. An easement for life or in fee is a freehold, and to this extent the cases above referred to must be regarded as overruled."

POSSESSION TO BE ADVERSE MUST BE OPEN, NOTORIOUS, VISIBLE, CONTINUOUS, AND HOSTILE: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71, and note 74; *Sherin v. Brackett*, 36 Minn. 152; *Scate v. Mills*, 49 Ark. 266; *Lewis v. Schwenn*, 93 Mo. 26; 3 Am. St. Rep. 511; *Schwallback v. Chicago etc. R'y Co.*, 69 Wis. 292; 2 Am. St. Rep. 740. The adverse possession which is necessary to confer title under the statute of limitations must be continuous for the full period required by the statute; if there is a break in the continuity of the possession, the time before and after such break cannot be connected so as to make out the requisite period: *Brown v. Hanauer*, 48 Ark. 277.

GILLETT v. WILEY.

[126 ILLINOIS, 310.]

ORDER OF COUNTY COURT REQUIRING GUARDIAN TO PAY OVER TO HIS WARD MONEY IN HIS HANDS IS CONCLUSIVE upon the guardian and his security upon his bond, except for fraud or mistake, as to the amount of money then actually in the hands of the guardian.

RECEIPT GIVEN BY WARD TO HIS GUARDIAN IS PRIMA FACIE EVIDENCE that the latter paid to him the sum named in it, on or before its date, but is not conclusive. Like any other receipt, it is open to explanation or contradiction.

LIABILITY OF SURETY ON GUARDIAN'S BOND IS FIXED by proof that the guardian never paid over to his ward the sum which the court ordered him to pay over, or any part of it, and that there had never been any settlement between the guardian and ward, unless the surety can show something which exonerates him, or which in equity will defeat the right of the ward to the relief sought.

GUARDIAN OWES HIS WARD DUTY WHICH CAN BE DISCHARGED ONLY BY PERFORMANCE of the condition of his bond, and no one except the ward has power to release the obligation of his guardian or the latter's surety.

MERE ORDER OF COUNTY COURT WILL NOT RELEASE GUARDIAN FROM OBLIGATION to account to his ward where such order is obtained, without notice to the ward, and by a receipt procured by fraud and circumvention, and if the guardian be not thereby released, neither will his surety be released. Before the county court can enter an order discharging a guardian, it must appear to it that he has complied with its order requiring him to pay over to his ward all money in his hands belonging to the ward.

DOCTRINE OF ESTOPPEL IN PAIS IS NEVER APPLIED TO ONE WHO IS WITHOUT FAULT, or who has not by some act or declaration, or by silence when he should speak, induced another to alter his condition on the faith of such acts or the truth of such declarations. The facts which give rise to an estoppel must be such as to make it unjust and inequitable to allow the party estopped to assert what would otherwise be his right, or make proof of matters tending to establish such right.

TO CREATE ESTOPPEL, THERE NEED NOT BE ACTUAL FRAUDULENT INTENT at the time of making the declarations, or performing the acts upon which the other party has relied, but it is essential that there should be voluntary acts or declarations by which another is made to believe in the existence of certain facts, and which induce him to act upon that belief.

WARD, WHEN NOT ESTOPPED BY RECEIPT TO HIS GUARDIAN. — Where a ward, after attaining his majority, is fraudulently induced by his guardian to sign a receipt in full, upon the false assurance that he was signing a promissory note, upon which receipt the guardian procures an order of final discharge, without notice to the ward, and without having paid over any of the money due from him to the ward, he is not thereby estopped from showing that he had not been paid, or from asserting his right against the guardian's surety, although the latter, after the guardian's release, and relying on it, released a mortgage taken by him from the guardian for his indemnity. The ward, in such a case, having no knowledge of who was surety, or that the surety had taken a mortgage from the guardian, owed no duty to the surety.

WARD NOT GUILTY OF NEGLIGENCE IN SIGNING RECEIPT FOR HIS GUARDIAN, WHEN. — Where a ward, reared in ignorance, and allowed to fall into vicious habits, and for several years afflicted with a nervous disease which had impaired to some degree his mental faculties, is, a short time after he attains his majority, waked out of sleep by his guardian, in whom he had every confidence, and in whose family he still continued to reside, and fraudulently induced to sign a receipt in full to his guardian, upon the latter's assurance that the paper presented to him for his signature was a promissory note, he cannot be regarded as guilty of negligence, although he affixed his mark to the paper without reading it, or making himself acquainted with its contents.

COURTS WATCH WITH GREAT JEALOUSY SETTLEMENTS OF GUARDIANS with their wards, or any act or transaction between them affecting the estate of the ward. From the confidential relations between them, it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them prejudicially affecting the interests of the ward will be held to be constructively fraudulent.

PRESUMPTION OF GUARDIAN'S INFLUENCE AND WARD'S DEPENDENCE CONTINUES after the legal condition of guardianship has ended, and transactions between them, during the continuance of the presumed influence of the guardian, will be set aside, unless shown to have been the deliberate act of the ward after full knowledge of his rights. To bind the ward, it must appear that he acted after the termination of his disability with deliberation and with full knowledge of all material facts.

SURETY OF GUARDIAN UNDERTAKES THAT HIS PRINCIPAL WILL FAITHFULLY PERFORM HIS DUTY in respect to the money that comes into his hands belonging to his ward. He is presumed to know that an order of court discharging the guardian may be set aside for fraud, or any infirmity, in the dealings between the guardian and ward, and when by the exercise of reasonable care and diligence he could have ascertained the fact, he will be held to know of such infirmity.

RECORD OF DISCHARGE OF GUARDIAN, PROCURED BY HIS FRAUD, WILL NOT PROTECT the surety on his bond, where the latter, having the means of ascertaining the truth, neglects to employ such means.

STATUTE OF LIMITATIONS BEGINS TO RUN, IN CASE OF FRAUD, ONLY FROM DISCOVERY of the fraud, or from the time when it could have been discovered by the use of reasonable diligence. But the failure to use such diligence may be excused when there exists a relation of trust and confidence between the parties, rendering it the duty of the party committing the fraud to disclose to the other the truth, and where it was through the acts of the former that the latter was induced to refrain from inquiry.

EQUITY ADOPTS PERIOD OF LIMITATION FIXED BY STATUTE in enforcing the rights of a ward against the surety on his guardian's bond, unless there exists some equitable reason for adopting a different period.

BILL in chancery, filed by John E. Wiley, against Joshua Day and John D. Gillett, to set aside the discharge of Day as guardian of Wiley, and for a decree for the sum due to complainant from said Day as guardian. The facts appear from the opinion.

Blinn and Hoblitt, for the appellant.

S. L. Wallace, and Beach and Hodnett, for the appellee.

By COURT. The last account of the guardian, filed in the county court June 22, 1869, just after his ward's majority, shows in the guardian's hands the sum of \$2,695.41 belonging to the ward, which was directed by the court to be paid to the ward, less the sum of eighteen dollars costs. It is conceded that the guardian never, at any time, paid any portion of the money to the ward, but on July 22, 1870, he filed his ward's receipt for \$2,677, dated July 1, 1869, and procured an order of the county court for his final discharge as guardian. There was no citation of the ward, nor was he present or given notice of such proceedings. An order had been previously entered by the county court requiring said guardian to pay over to his ward the sum of money in his hands, less the costs before mentioned, and such order is conclusive upon the guardian and his security upon his bond, except for fraud or mistake as to the amount then actually in the hands of the guardian: *Ammons v. People*, 11 Ill. 6; *Ralston v. Wood*, 15 Id. 159; 58 Am. Dec. 604.

The complainant's receipt, filed by the guardian, is *prima facie* evidence that his guardian, on or before July 1, 1869, paid him the sum of \$2,677, but is not conclusive. Like any other receipt, it is open to explanation or contradiction: *Scott v. Bennett*, 3 Gilm. 243; *Walrath v. Norton*, 5 Id. 437; *Frink v. Bolton*, 15 Ill. 343. The evidence clearly establishes that the receipt is not true, and that the guardian never, in fact, paid the complainant said sum, or any part of it, and that there had at no time been a settlement between the guardian and ward. This, of itself, is sufficient to fix the liability of appellant, who was surety on the guardian's bond, unless he has shown something which exonerates him, or which in equity will defeat the right of complainant to the relief sought.

No discussion of the facts as to whether, at the time of the execution of the receipt mentioned, the ward understood the purport of that instrument will be entered upon. He testifies that he was told that it was a note his guardian wished him to sign, and that he signed it without reading it, relying upon such statement. The evidence showing the contrary is shown to be so unreliable in its character as to entitle it to little or no weight or consideration. It may therefore be assumed as a fact that the receipt upon which the order of court was predi-

cated was obtained by said Day, guardian, by falsely representing to his ward that the paper presented for his signature was a note his guardian desired him to sign.

It is claimed that in giving this receipt by the ward to his guardian he failed to exercise proper care and caution in ascertaining the nature and effect of the instrument signed, and that he thereby put it in the power of the guardian to practice a fraud upon the court in procuring the order of discharge, and upon appellant, by means of such order and receipt, whereby appellant was induced to release his security, and that the ward should therefore be estopped from asserting the liability of such surety on said bond, and that complainant's laches are, in equity, sufficient to defeat the relief sought. It is clear, however, that the guardian owed his ward a duty which could be discharged only by performance of the condition of his bond, and that no one except the ward had power to release the obligation of the guardian or his surety. Before the county court could enter its order discharging the guardian, it must appear to that court that the guardian had complied with its former order, and paid over to his ward all money in his hands belonging to said ward. Under the circumstances here shown, the mere order of the county court would not avail to release the guardian from his obligation to account to his ward, and if the guardian is not released by it, it is equally clear that the surety would not thereby be released. If a dishonest guardian could file an *ex parte* account, showing payment in full to his ward, and by forged receipts, or receipts procured by fraud and circumvention, obtain an order of discharge, without notice to the ward, and thereby satisfy or defeat the condition of his bond requiring him to pay over to the ward the estate of the ward in his hands, it would defeat the purpose of the law in requiring such bonds, with security.

The principal contention, however, arises out of the fact that appellant had taken a mortgage upon the guardian's land to indemnify himself against loss by reason of his suretyship on said guardian's bond, and that by reason of said receipt, and the order of court thereby procured, and in reliance thereon, appellant was led to change his condition, and give up his security against loss by reason of his suretyship for said guardian; and it is contended that as, by giving the receipt, the ward aided his guardian in practicing a fraud upon appellant, he should be estopped from now disputing the validity and fairness of his receipt, and that he alone should suffer the con-

sequences of his own want of due and proper care and circumspection in signing said receipt.

The doctrine of *estoppel in pais* is never applied except where it would be contrary to equity to allow the assertion of the right, or proof of the fact, to avail. It is never applied to one who is without fault, or who has not, by some act or declaration, or by silence when he should speak, induced another to alter his condition on the faith of such acts or the truth of such declarations. The facts which give rise to an estoppel must be such as to make it unjust and inequitable to allow the party estopped to assert what would otherwise be his right, or make proof of matters tending to establish such right. Its effect is the forfeiture of a pre-existing right, or the exclusion of evidence of such right. At the time of the execution of this receipt by Wiley, it is apparent that he had no knowledge that appellant was security on the guardian's bond, or that the security on such bond, whoever he might be, had taken a mortgage or other security from Day. Wiley so testifies, and is uncontradicted by any credible testimony. It is therefore evident that he could have had no purpose, in executing said receipt, of aiding said Day in perpetrating a fraud upon the security on such bond, even if he had known that he was executing a receipt. The ward owed no duty to appellant; made no statement or declaration to appellant to influence his conduct. Instead of giving the receipt to deceive appellant, and induce him to believe that the guardian had paid him, he was himself the victim of fraud and deception.

It was said by this court in *People v. Brown*, 67 Ill. 436, that "the doctrine on this subject we understand to be, that when a person, by his words or conduct, voluntarily causes another to believe in the existence of a state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things." It is clearly apparent in this case that there was no voluntary act of Wiley which could have misled appellant, or induced him to part with his security. The act of Wiley was procured by fraud and misrepresentation of his guardian, for the faithful performance of whose duty appellant was surety. The mind of Wiley never assented to the execution of the receipt as an acknowledgment of having received the money therein mentioned. What he voluntarily did was to execute what he supposed to be a promissory note. It is not essential to the creation of estoppel that there should

be an actual fraudulent intent at the time of making the declarations or performing the act upon which the other party has relied, but it is essential that there should be voluntary acts or declarations by which another is made to believe in the existence of certain facts, and which induce him to act upon that belief: *Pickard v. Sears*, 6 Ad. & E. 469; *Freeman v. Cooke*, 2 Ex. 654; *Cornish v. Abington*, 4 Hurl. & N. 549; *People v. Brown*, *supra*; *Powell v. Rogers*, 105 Ill. 318.

The cases and text-writers seem to use interchangeably the words "willfully," "intentionally," and "voluntarily" as synonymous terms in discussing the question of the making of declarations or performing acts from which it is alleged an estoppel arises. The rule, as gathered from the various cases in respect of this element of estoppel, perhaps is, that where one voluntarily, by acts or declarations, represents a certain state of facts to exist, and thereby procures a change of conduct in another, he cannot afterwards be heard to assert a contrary state of facts, if injury results to or fraud is perpetrated thereby upon the party who had acted relying upon the truth of his representations. It is, however, claimed "that an equitable estoppel will arise by the negligent act and conduct of a party, even though ignorant of the truth of his declaration."

It is said in Bigelow on Estoppel, page 540: "It seems to be settled that a party's ignorance of the truth of the representation will not remove the estoppel if his ignorance is the result of gross negligence." It is urged that it was gross negligence for Wiley to sign the paper produced as a receipt, without informing himself as to the contents thereof. We have seen that he was ignorant of the fact that he was making any representation or acknowledgment of payment by the guardian. His negligence, if any is attributable to him, was in relying upon the statement of Day as to the contents of said paper. It, however, appears that appellee's father died in 1856; that appellee was then about eight years old; that on March 23, 1859, Day was appointed guardian, and took appellee to his (Day's) home, where the ward continued to reside as a member of the guardian's family until after he became of age, and until the spring of 1881. When the signature was procured to the receipt, the ward was still an inmate of his guardian's family, and had just arrived at his majority. He would not be expected to distrust his guardian or question the truthfulness of his representations. Appellee says he had

every confidence in his guardian, and the facts and circumstances shown tend to corroborate his statement. He was assured that the paper he was asked to sign was a note, and having been just awakened from sleep, did not read the paper before affixing his mark to it. That we can now see how utterly unworthy of confidence this guardian was, and how recreant to every trust and confidence reposed in him, furnishes no criterion for determining the condition of appellee's mind in this respect. Considering, as we must, the confidential and intimate relations existing between appellee and his guardian, with whom he had had no settlement, or talk of settlement, of the ward's affairs, it cannot be said that there was anything to apprise appellee that he might be acknowledging payment by the guardian, or that would put him upon inquiry in that regard. It is to be remembered that this boy, while having a considerable patrimony, had been reared in ignorance, and allowed to fall into vicious habits, and, in addition, had, several years prior to his arriving at majority, become afflicted with a nervous disease that to some degree impaired his mental faculties. If it be conceded that appellee knew that Day was his guardian, or that Day had money in his hands belonging to appellee, what was there to induce appellee to believe that the signing of this particular paper had anything to do with the matter of his estate? Manifestly, nothing whatever.

Ordinarily, one having the means of information as to the contents of a paper executed by him will, as against third persons, be held to have known the contents, and will not be permitted to assert his ignorance of its contents to avoid responsibility according to its real import. Here, however, the signing of this receipt was the will and act of the guardian, rather than that of appellee. Courts will watch settlements of guardians with their wards, or any act or transaction between them affecting the estate of the ward, with great jealousy. From the confidential relation between the parties, it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them prejudicially affecting the interests of the ward will be held to be constructively fraudulent: *Carter v. Tice*, 120 Ill. 277. The doctrine is thus stated in 1 Story's Equity Jurisprudence, section 217: Where the guardianship has in fact ceased by the majority of the ward, the courts "will not permit transactions between guardians and wards to stand, even when they have

occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the term, the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian; for in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased,—as if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian.”

It is seen that the presumption of influence on the part of the guardian, and the dependence of the ward, continues after the legal condition of guardianship has ended, and transactions between them, during the continuance of the presumed influence of the guardian, will be set aside, unless shown to have been the deliberate act of the ward, after full knowledge of his rights. In all such cases “the burden rests heavily upon the guardian to prove the circumstances of knowledge and free consent on the part of the ward, good faith and absence of influence, which alone can overcome this presumption”: 2 Pomeroy’s Eq. Jur., sec. 961, and authorities cited. It is not only shown as a fact, but will be presumed from the circumstances here shown, that undue influence was exercised by the guardian in procuring the receipt of his ward. The act, then, was the act of the guardian,—the carrying into effect of his will, to which the mind of the ward was subordinated. In no just sense can it be said that a party thus circumstanced has been guilty of negligence. To bind the ward, it should appear that he acted after the termination of his disability with deliberation, and with full knowledge of all material facts: *Fish v. Miller*, 1 Hoff. Ch. 267; *Scott v. Freeland*, 7 Smedes & M. 409; 45 Am. Dec. 310; *Sherry v. Sansberry*, 3 Ind. 320; *Trader v. Lowe*, 45 Md. 1; *Ferguson v. Lowery*, 54 Ala. 510; 25 Am. Rep. 718; *Garvin v. Williams*, 44 Mo. 465; *Harris v. Carstarphen*, 69 N. C. 416; *Wade v. Lobdell*, 4 Cush. 510.

Nor can it be said that appellant was a third party, charged with no duty in respect of the matters here being considered. He was under contract obligation to the ward to the extent of the money coming into the hands of the guardian, and had undertaken that the guardian would faithfully perform his duty in respect thereof. He is presumed to have known the law, and therefore must have known that the order of the

county court was liable to be set aside for fraud, or any infirmity in the dealing between the guardian and ward. He was required to know that nothing short of the actual payment of the money in his hands would release the guardian from his liability as such, and that, in the event of said order being set aside, the guardian would be liable to account to said ward. He is shown to have known that the ward had been, and was then, a member of the guardian's family, and had but recently attained his majority. Common prudence would therefore dictate that further inquiry should be made than merely looking to the record and the receipt before releasing his indemnity. The ward was in the neighborhood, and could have readily been seen and inquired of as to whether or not he had been paid. To hold otherwise would be to put it in the power of every insolvent guardian who may have given security to his bondsmen to despoil his ward of his estate, and then, by fraud or undue influence, procure the simple receipt of his ward, and thereby discharge the liability of the security upon the guardian's bond.

But it is said, that where one of two innocent persons must suffer by the fraud of a third person who owed a duty to both, he who put it in the power of the third person to commit the fraud must bear the loss rather than the other. It is contended that appellee, by giving the receipt, enabled the guardian to impose upon the court and appellant, and the principle mentioned is sought to be invoked against him. As we have seen, he did not knowingly give the receipt, nor did he have any knowledge that appellant held a mortgage or other security against loss by reason of his suretyship, and was not guilty of negligence with which he was chargeable in signing said receipt. The object of requiring a bond with security is to protect the ward from the fraud and dishonesty of his guardian no less than against his insolvency, and to allow the surety to escape liability through the very fraud of his principal which he was under contract obligation to protect the ward against would be to establish a most dangerous precedent, and render such bond unavailing as a protection to the ward, and defeat the purpose of the law in requiring guardians to give bond with security. In *Forrester v. State*, 46 Md. 154, it is said "that it is the duty of sureties on the bond of the guardian to make inquiry, and see that their principal discharges the obligation resting upon him, whether he be solvent or insolvent." It was the duty of appellant, as it is of

the courts, to scrutinize with care the transactions between the ward and the guardian for whom he is surety. When, by the exercise of reasonable care and diligence, the fact can be ascertained, he should be held to know of any infirmity in the dealings of the guardian with his ward. While full faith and credit must be given to the public records,—and those relying upon and dealing in view of them will ordinarily be protected,—the record of discharge of the guardian by the county court will not protect the guardian, or the surety on the guardian's bond, if such order is procured by the fraud of the guardian. In view of the facts of this case, it must be held that the negligence of the surety in not determining what was the truth, when the means of ascertaining the same was readily at hand, was the occasion of his loss, if loss he must suffer.

The delay of appellee in bringing this bill is set up and relied upon as laches, which should defeat the relief sought. The bill was not filed until twelve years after the right of action accrued. The statutory limitation to suits upon the bond then in force was sixteen years. Courts of equity, in enforcing rights of the ward as against the surety, will, unless there is some equitable reason for the adoption of a different period, adopt the limitation fixed by the statute: *Scheel v. Eidman*, 77 Ill. 301. In cases of fraud, the limitation will begin to run only from the discovery of the fraud, or from the time when the fraud could have been discovered by the exercise of reasonable diligence; but it is well settled that the failure to use such diligence may be excused when there exists a relation of trust and confidence between the parties, rendering it the duty of the party committing the fraud to disclose to the other the truth, and where it was through the acts of the former that the latter was induced to refrain from inquiry: *Bigelow on Fraud*, 445; 2 *Perry on Trusts*, sec. 805; *Atlantic Bank v. Harris*, 118 Mass. 147; *Wear v. Skinner*, 46 Md. 257; 24 Am. Rep. 517. Here the suit was brought within the limitation of actions on the bond; and while the court may, for equitable reasons, adopt a less period of limitation, they will do so only when equity demands it. We see no reason in this case for departing from the general rule. It is true that the guardian became insolvent, as appellant says, in 1879; but appellee remained a member of the guardian's family, and under his influence and control, until 1881, and that he was subjected to and dominated by the will of the guardian is, we think, apparent. In 1880, appellant testifies,

appellee wrote him a letter demanding money that Day owed to appellee. It appears that appellant knew that appellee was living at Day's at the time of the release of the mortgage, and long subsequently; that he had seen Wiley occasionally, and knew of his physical affliction. It is shown that when Wiley became of age "he was a drunken spendthrift." In view of the facts disclosed, we are not prepared to say that good conscience requires the application of the doctrine of laches.

Finding no error in this record, the judgment of the appellate court is affirmed.

GUARDIAN AND WARD—SETTLEMENT WITH WARD, WHEN NOT BINDING. — Where a minor, shortly after coming of age, settled with his guardian, received the balance into his hands, and gave a receipt in full, such receipt was no bar to a new settlement, even in the absence of fraud and circumvention: *Say v. Barnes*, 4 Serg. & R. 112; 8 Am. Dec. 679. The report of a guardian after its approval by the court must at least be taken as *prima facie* correct, and is conclusive until he who assails it overthrows it by proof, the burden of which is upon the assailant: *Warfield v. Warfield*, 74 Iowa, 185. A decree of the probate court rendered on the final settlement of a guardian is a bar to a subsequent bill in equity to compel a settlement, unless the first settlement is impeached for errors of law or fact, or upon the ground of accident, surprise, or fraud, in a manner similar to that by which relief is sought in equity against a judgment at law: *Crumpler v. Deans*, 85 Ala. 149.

RECEIPTS. — **RECEIPTS ARE NOT CONCLUSIVE:** *Ryan v. Ward*, 48 N. Y. 204; 8 Am. Rep. 539; *Henry v. Henry*, 11 Ind. 236; 71 Am. Dec. 354; but receipts are *prima facie* evidence of facts stated therein, until the contrary appears: *Van Brunt v. Pike*, 4 Gill, 270; 45 Am. Dec. 126; *Reid v. Reid*, 2 Dev. 247; 18 Am. Dec. 570; *Ensign v. Webster*, 1 Johns. Cas. 145; 1 Am. Dec. 108; note to *Fuller v. Crittenden*, 23 Am. Dec. 368.

FRAUD—FIDUCIARY RELATIONS. — **TRANSACTIONS BETWEEN PERSONS BETWEEN WHOM A FIDUCIARY RELATION EXISTS** may be shown to be fraudulent by far less proof than transactions between other persons: *Burt v. Timmons*, 29 W. Va. 441; 6 Am. St. Rep. 664, and note 676; *Lively v. Winton*, 30 W. Va. 555. If an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted; this rule is not limited to the relation of attorney and client, guardian and ward, trustee and *cestui que trust*, or other such relations, but holds good wherever a fiduciary relation exists: *Fisher v. Bishop*, 108 N. Y. 25; 2 Am. St. Rep. 357, and note 361.

ESTOPPEL. — **ESSENTIAL ELEMENTS WHICH AMOUNT TO AN ESTOPPEL ARE, THAT THE STATEMENT WAS MADE WITH EXPRESS intent to deceive, or that it was made with such carelessness as will be construed to be culpable negligence on the part of one making the statement:** *Bynum v. Preston*, 69 Tex. 287; 5 Am. St. Rep. 49, and note 53; *Montgomery v. Keppel*, 75 Cal. 128; 7 Am. St. Rep. 125. Estoppel may be created not only where the party sought to be concluded knows the material facts he is charged with having represented or concealed, but where he was in such a position that he ought to have known them, so that the knowledge will be imputed to him: *Weinstein v. National Bank etc.*, 69 Tex. 28; 5 Am. St. Rep. 23, and note 28. Estoppel

may arise where one by his acts, conduct, or declarations induces another to alter his position injuriously to himself: *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285, and note 304; note to *Humphreys v. Finch*, 2 Am. St. Rep. 296; *New York R. Co. v. Rothery*, 107 N. Y. 310; 1 Am. St. Rep. 822, and note 826. One is concluded not only by what he does or says, but also by the natural and reasonable inference from his declarations and conduct: *Irvine v. Scott*, 85 Ky. 260. A municipal corporation is not estopped to set up a defense to a judgment held against it by an assignee, although its officers represented to such assignee, when about to purchase such judgment, that it would be settled if such representation was made in good faith, and without knowledge or culpable ignorance of the defense, or as a mere expression of opinion, or was made without express authority of the city council: *Taylor v. Nashville R. R. Co.*, 86 Tenn. 228.

GUARDIAN AND WARD. — **SUITS ON GUARDIAN'S BOND:** See note to *Commonwealth v. Stub*, 51 Am. Dec. 534; *State v. Slevin*, 93 Mo. 253; 3 Am. St. Rep. 526, and note.

STATUTE OF LIMITATIONS — EQUITY. — Equity follows the rules of law in the application of the statute of limitations: *Reynolds v. Sumner*, 126 Ill. 58; ante, p. 523, and note; *Switzer v. Noffsinger*, 82 Va. 518; *McCarthy v. Ball*, 82 Va. 872.

BIRMINGHAM FIRE INSURANCE CO. v. PULVER.

[126 ILLINOIS, 829.]

INSURANCE COMPANY IS BOUND TO POINT OUT DEFECTS IN PROOFS OF LOSS, and to afford to the insured all reasonable facilities for ascertaining what they are, so that he may be able to remedy them. And its refusal to afford to the insured reasonable facilities to prepare and serve amended proofs of loss is evidence for the jury as tending to show a waiver of the defects in the proofs.

INTERVIEWS AND CORRESPONDENCE BETWEEN INSURED'S ATTORNEY AND AGENTS of an insurance company are competent evidence tending to prove a waiver of alleged defects in proofs of loss in a case where, after a loss, the insured furnished proofs to which exceptions were taken, and the attorney who prepared the proofs having meantime died, and another attorney being employed by the insured to correct the proofs, the latter called upon the local agent to learn what was wrong, and what could be done to correct the proofs, and the agent promised to show him the proofs, but failed to do it, whereupon the attorney called upon the adjusting agent, who refused to let him see the proofs, and then wrote to the local agent reciting his efforts in the matter, and asking for an explanation.

INSURED IS NOT CONCLUDED BY CERTIFICATE OF MAGISTRATE AS TO AMOUNT OF LOSS required by the policy to be furnished as part of the proofs of loss, but may, notwithstanding such certificate, establish by witnesses the true amount of the loss. By furnishing such certificate he merely complies with a condition of the policy, without admitting its accuracy or agreeing to be bound by it.

INSURED IS NOT ESTOPPED EVEN BY HIS OWN SWORN STATEMENT IN HIS PROOFS OF LOSS, but may, in a suit on the policy, give evidence of the actual amount of his loss, and recover accordingly.

COURT MAY PREPARE HIS OWN CHARGE TO JURY, and is not limited to instructions submitted by counsel.

ACTUAL CASH VALUE OF PROPERTY IS PRICE IT WILL BRING in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price. There is no error in explaining in an instruction to the jury "actual cash value" as meaning "fair cash value," or in using the two phrases as practically synonymous.

CONDITION IN POLICY OF INSURANCE PROVIDING FOR ARBITRATION CANNOT DEPRIVE INSURED OF HIS RIGHT OF ACTION, unless clearly made a condition precedent to the existence of such right.

PARTY CANNOT COMPLAIN OF INSTRUCTION MORE FAVORABLE THAN HE HAD RIGHT to ask for.

INSTRUCTIONS TO JURY WHICH FAIRLY AND CLEARLY STATE EVERY MATERIAL POINT having a direct bearing upon the issues in the case, are sufficient, although they omit several propositions in instructions asked which bear merely upon collateral matters, and consisting of lectures to the jury upon the proper method of discharging their duties, or cautions against prejudice and favoritism. The giving of instructions of this character is very much within the discretion of the court, and if, in his opinion, they are not necessary to a due administration of justice, his refusal to give them cannot ordinarily be assigned for error.

ESTIMATES OR OPINIONS OF WITNESSES WHO SAW DÉBRIS AND ASHES AFTER FIRE, based upon what they saw, of the quantity of goods lost by the fire, are inadmissible in evidence in an action on a policy of insurance to recover the amount of the loss. Apart from the fact that these opinions are based upon *data* too uncertain and equivocal to be of any value, such a case is not one that properly admits of expert evidence.

COURT MAY CONFINE COUNSEL WITHIN REASONABLE LIMITS IN CROSS-EXAMINATION of witnesses, and the exercise of its discretion in doing so, if not abused, cannot be assigned for error.

REMARKS OF COURT IN RULING UPON ADMISSIBILITY OF EVIDENCE, consisting of statements that the evidence upon certain points was thus and so will not be ground for reversal, where the jury were told that they were the judges of the weight of the evidence and of the credibility of the witnesses, and were given the usual instructions as to the preponderance of the evidence, and made to thoroughly understand that it was their province to determine what were the facts established by the evidence.

ASSUMPSIT. The opinion states the case.

Moses and Newman, for the appellant.

Kraus, Mayer, and Stein, for the appellee.

BAILEY, J. This was a suit in *assumpsit*, brought by Emilie Pulver against the Birmingham Fire Insurance Company of Pittsburg, to recover the amount of a loss under a policy of insurance against fire. The trial in the superior court resulted in a judgment in favor of the plaintiff for \$1,103.85 and costs, which judgment was affirmed on appeal by the appellate court. By a further appeal the defendant brings the record to

this court, and assigns for error the judgment of the appellate court.

The policy of insurance in question was one of three policies for one thousand dollars each, issued to the plaintiff by the defendant and two other insurance companies, upon her stock in trade, consisting chiefly of dresses and cloaks, manufactured and in process of manufacture, and in dress goods and trimmings, contained in a certain building on North Clark Street, Chicago. Various questions of fact were presented at the trial, upon most of which the evidence was more or less conflicting. Most prominent among these were, whether the plaintiff was the owner of the property insured at the time the policy was issued and at the time of the loss, whether the plaintiff fraudulently overstated the amount and value of the property destroyed or damaged in her proofs of loss, whether she fully performed the conditions of the policy relating to preliminary proofs of loss, or whether the defendant accepted the proofs rendered as a performance of said conditions and waived further performance, and the true amount and value of the property damaged or destroyed. As to all these questions the judgment of the appellate court in favor of the plaintiff is conclusive.

Complaint is made of the admission by the superior court of certain evidence offered by the plaintiff upon the question of a waiver by the defendant of the conditions of the policy in relation to preliminary proofs of loss. The policy contained the condition usually found in fire policies on that subject, and the first count of the declaration alleged the furnishing of certain proofs of loss and an acceptance and approval of such proofs by the defendant, and a waiver of all exceptions and objections thereto, while the second count alleged that the defendant waived and dispensed with the proofs of loss required by the policy. Certain proofs of loss furnished by the plaintiff to the defendant having been read in evidence, and it appearing that the defendant, after having retained said proofs for a considerable time, took some exceptions thereto, the plaintiff, to establish a waiver of the alleged defects in the proofs, gave evidence, among other things, tending to show that shortly after said proofs were served the attorney who drew them up had died, and that the plaintiff thereupon employed another attorney, who called upon the local agent of the defendant twice to ascertain what was the difficulty with the proofs, and to learn what should be done by way of

correcting them; that the local agent offered to show him the proofs, but failed to do so; that he then called upon the defendant's adjusting agent, who also refused to let him see the proofs. The plaintiff then offered, and the court admitted in evidence over the objection and exception of the defendant, a letter written by the attorney to the local agent after the failure of his several efforts to obtain a view of the proofs, in which he recounted his several efforts in that behalf and their result, and asked for an explanation. We can perceive no error in the admission of this letter. That and the attorney's preceding interviews with the defendant's agents were only parts of the attempt on his part to ascertain the nature of the objections to the proofs of loss, so as to be able to obviate them. If there were any defects in the proofs of which the defendant, in good faith, complained, it was its duty to point them out, and afford all reasonable facilities to the plaintiff to ascertain what they were so as to be able to remedy them. A refusal to exhibit the proofs was evidence tending to prove that the objections urged were merely captious, and not made with any view of obtaining corrected proofs. The unwillingness of the defendant to afford reasonable facilities to the plaintiff to prepare and serve amended proofs was evidence for the jury to consider, as tending to show that it was content with the proofs already furnished, and therefore waived all defects therein. It follows that the interviews and correspondence between the plaintiff's attorney and the defendant's agents in relation to obtaining a view of the proofs served was competent, as tending to prove such waiver.

The plaintiff, in her proofs of loss, stated the amount of her loss to be \$3,886.95, while the notary public whose certificate is appended to and forms a part of said proofs stated the loss to be \$1,000. The defendant claims, as a matter of law, that the plaintiff is bound by the notary's certificate as to the amount of the loss, and that, as there are three concurrent policies of one thousand dollars each, the plaintiff's recovery should have been limited to one third of the amount certified to by the notary. In this view we are unable to concur. Proofs of loss are required by the conditions of policies of insurance for the purpose of furnishing the insurer with evidence upon which to determine the fact and the amount of its liability, and also to serve as the basis for the adjustment of the loss with the insured. Among the proofs required are the plaintiff's sworn estimate of the amount of the loss and

an official estimate of it by a neighboring and disinterested magistrate. The magistrate's certificate is produced, not as the award of an arbitrator, or as the certificate of a party by whose estimate the insured, either expressly or impliedly, agrees to be bound, but merely as the estimate of a party which the insurer sees fit to require by the conditions of the policy. The insured obtains and furnishes the certificate as a performance of such condition, and not as admitting its accuracy or agreeing to be bound by it. It is open to him, notwithstanding the certificate, in a suit upon the policy, to establish by witnesses the true amount of the loss.

It has been frequently held that even the sworn statement of the insured himself in his proofs of loss will not estop him, but that, in a suit upon the policy, he may give evidence of the actual amount of his loss, and recover accordingly: *Lebanon Ins. Co. v. Kepler*, 106 Pa. St. 28; *Miaghan v. Hartford Ins. Co.*, 24 Hun, 58; *Hoffman v. Aetna Ins. Co.*, 1 Rob. (N. Y.) 501; 32 N. Y. 405; *Parmelee v. Hoffman Fire Ins. Co.*, 54 Id. 193; *McMaster v. Insurance Co.*, 55 Id. 222; 14 Am. Rep. 239; *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464. In *Farrell v. Aetna Fire Ins. Co.*, 7 Baxt. 542, it was held that the statement in the magistrate's certificate as to the value of the property lost by fire is not even competent evidence in favor of the insured to show the amount of the loss, which could certainly not be the rule if such certificate constituted an estoppel, for the reason that estoppels must be mutual.

A number of exceptions were taken by the defendant to the rulings of the court in giving and refusing instructions to the jury. The defendant asked nineteen instruction, all of which, as well as the instructions asked by the plaintiff, were refused, the court giving, in lieu of the instructions asked, a series of instructions prepared by himself, covering, as he seemed to view the case, all the questions of law presented upon which it was necessary or advisable to instruct the jury. The propriety of the practice thus adopted is challenged, the proposition contended for seeming to be, that in this state the functions of the court in the matter of instructing the jury are practically limited to giving or refusing the written instructions submitted by counsel. Such, clearly, is not the case. True, he may, if he sees fit, limit himself to giving the instructions submitted by counsel which properly state the law, and then, even though the law be inadequately given to the jury, no error can ordinarily be predicated upon such action, because,

if counsel had deemed further instructions necessary, they might and should have asked them. But where the judge sees proper to do so, it is competent for him to prepare his own charge to the jury, but if he does so, he should embody in it, either literally or in substance, all proper instructions asked by counsel. Indeed, the preparation of a charge by the judge may often have the advantage of furnishing the jury with a terse, consecutive, and logical statement of the law applicable to the case, in place of the loose, disjointed, and obscure presentation of the law which often results from giving instructions in the form in which they are prepared by the respective counsel.

The series of instructions given by the court is criticised both for what it contains and for what it omits. So far as it goes, we are able to discover no error of which the defendant can complain. It is urged that it is erroneous in directing the jury to estimate the plaintiff's damages, in case of a recovery, according to the "fair cash value" of the property destroyed, while the policy requires that the estimate should be made according to "the actual cash value" of the property. Between these two forms of expression we are unable to perceive any practical difference. The actual cash value of property is the price which it will bring in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price. The actual cash value, then, is the fair or reasonable cash price for which the property can be sold in the market. We see, therefore, no impropriety in explaining the "actual cash value" as meaning the "fair cash value," or in using the two phrases as practically synonymous.

The instructions given enumerate, among the defenses of which the defendant was seeking to avail itself, the failure of the plaintiff to submit her difference with the defendant in relation to her loss or damage to arbitration, in accordance with the conditions of the policy, and on that question the jury were instructed as follows:—

"As to the question of arbitration, you are instructed that, under the provisions of the policy, if there was a dispute as to the amount of the loss, then either party could demand an arbitration to determine the amount of such loss, by serving a notice, in writing, on the opposite party; and before you can find against the plaintiff on this point, you must believe, from the evidence, that there was a dispute between the parties as to the amount of the loss, and that notice in writing was served

on her, or on some one authorized to act for her, demanding such arbitration in accordance with the provisions of the policy, and that she, in person or by her attorney, without sufficient cause, refused to submit to such arbitration."

It is insisted that this instruction, though holding the law substantially in accordance with the defendant's theory, is erroneous in not conforming in its hypothesis to the evidence as it was actually given, the evidence being, as is claimed, in accordance with the hypothesis of an instruction asked by the defendant, which was as follows:—

"If the jury believe, from the evidence, that the plaintiff requested such award, and the defendant accepted and acted upon such request, and proceeded to appoint an arbitrator, and if the jury further believe, from the evidence, that the plaintiff, without any sufficient reason, abandoned said arbitration so requested by her, then the plaintiff cannot recover in this case, and your verdict will be for the defendant."

It is useless to inquire whether the instruction given is defective as claimed, for the reason that, under the conditions of the policy, a failure to arbitrate could in no event be a defense. The policy provides that "in case differences shall arise touching any loss or damage, after proof of these has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy." There is no condition in the policy that the loss should not be payable until such arbitration and award should be had, or in any way making a submission to arbitration a condition precedent to the payment of the loss. The promise to pay, and the provision making such payment conditional upon the production of proofs, etc., are in a preceding part of the policy, and are in no way incorporated with or made dependent upon the condition in relation to arbitration.

A condition in a policy providing for an arbitration cannot operate to deprive the insured of his right of action, unless clearly made a condition precedent to the existence of such right: *Liverpool, London, and Globe Ins. Co. v. Creighton*, 51 Ga. 95; *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Roper v. London*, 1 El. & E. 825; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272; *Reed v. Washington Fire and Marine Ins. Co.*, 138 Mass. 572; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419; *German*

American Ins. Co. v. Steiger, 109 Ill. 254. There was no error, therefore, in refusing the instructions asked by the defendant on the subject of arbitration, and the instruction given being more favorable to the defendant than it had a right to ask, there was no error in giving it of which the defendant can complain.

But it is claimed that the court erred in refusing the defendant's instructions, because they contain various propositions of law upon which the jury should have been instructed which are not covered by the instructions given. It would serve no useful purpose for us to review each of the refused instructions in detail, and it must therefore suffice for us to say generally that we have carefully examined them in connection with the instructions given, and are of the opinion that no proposition of law was omitted in respect to which the defendant has any substantial ground of complaint. Several of the instructions refused were properly refused on account of inherent defects in the instructions themselves. As to the residue, while some collateral points and details are not covered, we think every material point having a direct bearing upon the issues in the case is fairly and clearly stated. Several propositions, it is true, are omitted, which bear merely upon collateral matters, and consist of lectures to the jury upon the proper method of discharging their duties, or cautions against prejudice and favoritism. Instructions of this character may properly be given, but giving them is necessarily a matter very much within the discretion of the court. He is in a position to observe and know whether the situation is such as to render such cautionary instructions necessary to a due administration of justice, and if in his opinion they are not, his refusal to give them cannot ordinarily be assigned for error.

At the trial the defendant called several witnesses who saw the *débris* and ashes after the fire, and offered to introduce in evidence the estimates or opinions of said witnesses, based upon what they saw, as to the quantity of goods lost by the plaintiff. This evidence was excluded, and we think properly. Apart from the consideration that the opinions sought to be elicited were based upon *data* too uncertain and equivocal to be of any value, the case is not one which properly admitted of expert evidence. It was for the witnesses to describe what they saw, and if any reliable conclusions could be drawn from the appearance of the *débris* and ashes as they appeared some

time after the fire, the jury were as well qualified as the witnesses to draw such conclusions.

Certain criticisms are made upon the conduct of the judge during the course of the trial. On that subject we adopt, as expressing our views, the following portions of the opinion of the appellate court pronounced by Moran, J.:—

“Complaint is made of the course of the trial judge in interfering with the cross-examination of some of the witnesses, and because of remarks made in ruling on points in reply to the arguments of counsel. The cross-examinations were in some instances inordinately extended, and it is in the discretion of the court to confine counsel within reasonable limits. We find no abuse of such discretion in this case. While ‘patience and gravity of bearing is an essential part of justice,’ the judge has the direction of the trial, and is much better able to perceive what is unnecessary than counsel who is engaged in a heated contest with the witness. The remarks or comments of the court mainly complained of were made in ruling upon objections, and are statements that the evidence upon certain points was thus and so. The admissibility of evidence offered frequently depends upon the evidence already introduced, and it is not unusual for the court, in ruling, to allude to such evidence as is in the record, to make his meaning plain. This, of course, should be done in such manner as to express no opinion as to what such evidence proves. Owing to the regard which is paid by jurors to the opinion of the judge, he should use great caution in expressing his opinion on any question which it is the province of the jury to determine. But every unguarded expression of the judge in stating reasons to counsel for his rulings cannot be treated as a ground for granting a new trial. To do so would be to greatly embarrass the administration of justice. The jury were told that they were the judges of the weight of the evidence, and of the credibility of the witnesses, and were given the usual instructions as to the preponderance of the evidence, and from the whole course of the trial no doubt thoroughly understood that it was their province to determine what were the facts established by the evidence. We are of the opinion that the inadvertent remarks of the court did not in fact operate to the injury of appellant, and do not constitute such error as to require us for that reason to reverse the case.”

After a patient examination of the whole record, we fail to

find any error of law which, in our judgment, is material. The judgment of the appellate court will therefore be affirmed.

INSURANCE. — A PROVISION IN AN INSURANCE POLICY FOR ARBITRATION AT REQUEST of either party, in event of differences, does not render such arbitration a condition precedent to the right of the insured to sue for a loss sustained: *Gere v. Council Bluffs*, 67 Iowa, 272; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80; *Wynkoop v. Niagara Fire Ins. Co.*, 91 N. Y. 478; 43 Am. Rep. 686; *Nurney v. Fireman's etc. Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338.

INSURANCE — NOTICE OF DEFECTS IN PROOFS OF LOSS. — IF THE INSURERS INTEND to insist upon defects in the preliminary proofs of loss, they must notify the policy holder thereof, in order that he may amend his proofs if possible; and if insurers are silent, or object on other grounds, it is evidence of a waiver on their part: *Jones v. Mechanics' F. Ins. Co.*, 36 N. J. L. 29; 13 Am. Rep. 405. The company must specify wherein the proofs are defective: *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505; 14 Am. Rep. 304; *Franklin F. Ins. Co. v. Chicago Ins. Co.*, 36 Md. 102; 11 Am. Rep. 469; *Aetna Ins. Co. v. Tyler*, 16 Wend. 385; 30 Am. Dec. 90.

INSURANCE — MISTAKES IN PROOFS OF LOSS. — PROOFS ARE NO PART OF THE INSURANCE CONTRACT, and the assured is not estopped from showing that a statement in the proofs is a mistake: *McMaster v. Insurance Co. of N. A.*, 55 N. Y. 222; 14 Am. Rep. 239; *Fowler v. Springfield Ins. Co.*, 122 Mass. 191; 23 Am. Rep. 308. Defects in time of giving notice of loss stand on a different ground from defects in its matter; the latter may be remedied, but the former cannot: *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621.

INSTRUCTIONS NEED NOT BE GIVEN IN THE PRECISE WORDS REQUESTED, EVEN THOUGH CORRECT: *State v. Hoessie*, 15 R. I. 1; 2 Am. St. Rep. 838, and note 843; *Newby v. Harrell*, 99 N. C. 149; 6 Am. St. Rep. 503, and note 509; but doubtless it is better to give them in the form requested, if that form is not improper and misleading: *Cook v. Brown*, 62 Mich. 473; 4 Am. St. Rep. 870; though error cannot be assigned merely because the court refused to give the language requested in instructions: *Kendrick v. Towle*, 60 Mich. 363; 1 Am. St. Rep. 526.

COMMERCIAL UNION ASSURANCE CO. v. SCAMMON.

[126 ILLINOIS, 355.]

IN ILLINOIS, APPELLATE COURT MAY RENDER FINAL JUDGMENT FOR PLAINTIFF, where there is no evidence tending to prove the issues tendered, so that the trial court would have been justified in directing the jury to find for the plaintiff. Whether or not the record contains any evidence tending to establish a fact is a question of law for the court to decide.

SECOND INSURANCE BY ANOTHER WITHOUT RIGHT, EFFECT OF ON RIGHTS OF PRIOR POLICY HOLDER. — Where the owner of premises, after mortgaging them, takes out a policy of insurance thereon, and the mortgagee after selling the premises under a power in the mortgage and buying at his own sale, takes out another policy thereon in the same company, without the consent of the mortgagor, and a loss occurring, collects the proceeds of the policy, and the mortgagor causes the sale to be set aside,

and the mortgagee to be compelled to account to him for the proceeds of the policy so collected by him from the company, this will constitute no defense to a suit brought by the mortgagor against the company upon his prior policy.

CONDITIONS AGAINST ALIENATION IN POLICIES OF INSURANCE MUST BE STRICTLY CONSTRUED, the court having in view the object of the insurance company in inserting them.

CONSTRUCTION OF CONDITIONS AGAINST ALIENATION IN INSURANCE POLICY. —

Where in a policy of insurance on premises one clause of a condition provides that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, . . . in every such case this policy shall be void," and another clause provides that "when property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate," the latter clause will be held to have been intended to explain and qualify the meaning of the words of the former, and the sale or disposition of the property intended will be construed to be such as caused all interest of the assured in or control over the property to cease. And in such a case a sale of the property insured, which is voidable and is afterwards set aside, is not such an alienation as will avoid the policy.

TRUSTEE UNDER MORTGAGE CONTAINING POWER OF SALE CANNOT BECOME PURCHASER at his own sale, either directly or indirectly, and if he does so become the purchaser, the rights of the mortgagor will remain precisely the same as though no sale had been made, and such a sale will not constitute an alienation within the meaning of a clause against alienation in an insurance policy.

TRUSTEE'S SALE NOT WITHIN PROHIBITION AGAINST ALIENATION IN INSURANCE POLICY, WHEN. — Where a trust deed is made of property to secure a debt, and afterwards the maker of the deed takes out a policy of insurance upon the same property, containing a clause prohibiting its alienation, and the trustee, without his consent, and against his protest, sells the property to the *cestui que trust*, the maker of the trust deed being in possession and so remaining until after the sale, and until the property is destroyed by fire, denying the validity of the sale and asserting his right of possession and ownership, and within a reasonable time instituting proceedings to set the sale aside, the deed of the trustee is not such an alienation as is within the reasonable contemplation of the clause against alienation.

APPEAL. The opinion states the case.

Dexter, Herrick, and Allen, and Miller, Lewis, and Judson, for the appellant.

Charles F. White and Martin L. Wheeler, for the appellee.

WILKIN, J. At our March term, 1887, this case was before us on appeal from the appellate court for the first district. Two points were then made and urged as grounds of reversal, viz., change of title in violation of the conditions of the policy

sued on, and failure to furnish proofs of loss. These were considered, and under the facts found and certified by the appellate court, held insufficient to authorize a reversal, and the judgment of the appellate court was affirmed. A petition for rehearing being presented by appellant, it was then urged that the appellate court had no jurisdiction to render final judgment in the case, and also that a third point of controversy was in issue before the circuit and appellate courts, viz., whether or not a certain other policy issued by appellant on the same property, to one Babcock, was issued in lieu of the one in suit, by consent of appellee. It being found that this last question was fairly in issue, and the appellate court having failed to find and certify the facts thereon, a rehearing was granted, and the case reconsidered. The jurisdiction of the appellate court to render final judgment was sustained, but the cause was remanded to that court with directions: See 123 Ill. 601. In pursuance of that decision, the appellate court, on the 3d of July, 1888, entered judgment *de novo* in favor of appellee, for \$8,910 and costs, and in conformity with directions, a full statement of the facts on all the issues was certified to and made part of the record. Appellant again appeals.

The record is precisely the same as on the former hearing in this court, except that it now contains a finding of facts on the issue as to the substitution of the Babcock policy.

We have again considered all the questions involved in the case, and reconsidered the argument of counsel for appellant on the first two issues, and find no reason to change the conclusion heretofore announced thereon and fully set forth in the opinion by Justice Scholfeld filed prior to the rehearing, and on these questions that opinion is herewith refiled and adopted.

It is again insisted that the appellate court erred in rendering final judgment; and it is argued that, notwithstanding the power of that court to render such a judgment, as held in our former opinion (123 Ill. 601), it can only do so in cases where there is such a want of evidence on behalf of the defendant as to justify a trial court in taking the case from a jury or direct a finding for the plaintiff. Here, it is said, there is evidence tending to sustain the defense of failure to furnish proofs of loss, and also that of the substitution of the Babcock policy for the one sued on. It is assumed that on this last issue we have already held that there is a conflict of evidence. If that assumption is based upon anything heretofore said, there

is a misconception of our meaning; for in the opinion remanding the case to the appellate court, we expressly stated that we were not allowed to look into the record and find what the facts were.

While under sections 87 and 89 of the Practice Act we have no authority to look beyond the finding of the appellate court to ascertain the facts, yet, as in case of the trial court having instructed the jury to return a verdict for the defendant, we may examine the bill of exceptions for the purpose of determining whether there is any evidence tending to prove the issue. What facts are established by the evidence, the appellate court must find and certify, and its finding is conclusive. Whether or not the record contains any evidence tending to establish a fact is a question of law, and which we must decide. In this view of the law, we have examined all the evidence bearing upon the questions involved, and given due consideration to the construction sought to be placed upon it by counsel in order to make it appear that there is such a conflict of testimony as to entitle the appellant to have the issues submitted to a jury, and we are satisfied that by no fair and impartial consideration of all the evidence can it be held that such conflict exists.

The only remaining question to which our attention need be directed is, Did the appellate court decide correctly on the facts found by it on the third point of contention above mentioned? On that defense, the position of appellant is, that after the policy in suit was issued to appellee, and at a time when Babcock claimed to be the owner of the insured property, appellant issued its policy to him on the same property for the same amount, which last insurance was to be in lieu of that previously issued to appellee, and that such substitution was with the consent of appellee; that after the destruction of the insured property it paid the Babcock policy in full, and is therefore discharged from all liability on the one here sued on. On that issue, the appellate court finds that such a policy was issued to Babcock, and on the assumption by appellant that the title to the insured premises was in Babcock, and that appellee, Scammon, had no title or interest therein; that on proofs of loss appellant paid said policy in full before this suit was brought; that said policy was not issued with the consent of appellee, Scammon, in lieu of the policy involved in this suit, but without his consent, upon the assumption by appellant that he had lost all title to the insured

premises, which assumption was never in any way acquiesced in by appellee. Resting the decision of the appellate court upon this state of facts, there could be no pretense that it was erroneous. No one would seriously contend that on such a state of facts the rights of appellee could be defeated.

The appellate court further finds that in a chancery proceeding, in which a sale of the insured property to Babcock was set aside, said Babcock was required to account to appellee for the said amount of insurance received by him under his policy, and thereby appellee had the benefit of said sum, but that it was not "claimed or received by Scammon as in lieu of or in satisfaction of the claim on the policy now in suit."

Various theories are attempted to be advanced by counsel for appellant upon this finding, under which it is claimed that the payment of the Babcock policy should be held to discharge all liability on the one issued to appellee. None of them can be maintained. Appellee had nothing to do with the issuing of that policy. He made no claim of rights under it. He could have done nothing to enforce it. He was in no way bound by anything done by Babcock or the mortgage company. He in no legal sense ratified anything done by him or it in procuring the policy. All that he had a right to do, and all that he did do, was to ask a court of equity to require Babcock to account to him for any money actually received by him under his false claim of ownership. This a court of chancery had full power to grant, without any reference to the facts and circumstances under which the policy had been issued, and wholly independent of the fact as to whether appellee consented thereto or not. As between the parties, it was sufficient for the chancellor to know that Babcock had actually received money, as rent, insurance money, or otherwise, under a claim of ownership which was fraudulent and invalid, to authorize a decree requiring him to pay it over to the rightful owner. Had the Babcock policy been issued and paid by an entirely distinct company, appellee's right to demand, and the power of a court of chancery to require, the payment to appellee would have been no more complete. Under the finding of facts by the appellate court, the two contracts of insurance are as distinct as though they had been issued by different companies, and as between appellee and appellant, the Babcock policy is no more available as a defense to this suit than if they had been so issued.

The decision of the appellate court, on the facts, is clearly right, and its judgment will be affirmed.

The following is that part of the opinion upon which a rehearing was granted, which is readopted by the foregoing opinion:—

SCHOLFIELD, J. Counsel for appellant contend that it appears upon this record, as it did when the case was here before, that there was a breach of the clause against alienation. The appellate court, in its opinion per Mr. Justice McAllister, 20 Bradw. 505, says on this question:—

“First, then, as to the alleged breach of the condition of the policy against alienation. What is to be taken as the true meaning, when the different clauses are construed together? All the authorities agree that such conditions must receive a strict construction, the court having in view the object of the insurance company in inserting them. The language in which the condition in question is expressed is as follows: ‘If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, . . . in every such case this policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate.’ When both the above clauses are considered together, in the light of the rules to which we have adverted, it appears to us that the last clause was intended to explain and qualify the meaning of the words of the former, and define what sort or nature of transfer or conveyance of the property and change of title was contemplated and provided against. The character so given and intended was such a sale or disposition of the property as caused all interest of the assured in or control over the property to cease. That was the construction given to clauses in the same language, by the court of appeals of New York, in *Browning v. Home Ins. Co.*, 71 N. Y. 513; 27 Am. Rep. 86.

“In *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176, the court, in discussing what transfer or change of title would avoid the policy, held to the following sensible views: ‘The object of the insurance company by this clause is, that the interest shall not change so that the insured shall have a greater temptation or motive to burn the property, or less interest or watchfulness

in guarding and protecting it from destruction by fire. Any change in or transfer of the interest in the property of a nature calculated to have this effect is in violation of the policy. But if the real ownership remain the same,—if there is no change in the fact of a title, but only in the evidence of it, and this latter change is merely nominal, and not of a nature calculated to increase the motive to burn or diminish the motive to guard the property from loss by fire,—the policy is not violated.’

“*Loy v. Home Ins. Co.*, 24 Minn. 315, 31 Am. Rep. 346, supports the same doctrine, and many other cases of the same import might be cited. The case of *Orrell v. Hampden Fire Ins. Co.*, 13 Gray, 431, is in harmony with the same principles, for it holds that, to constitute a breach of the condition of insurance relating to the conveyance of the property, there must have been an actual sale or transfer of the property, valid as between the parties. There is a vein of the same doctrine in *Dailey v. Westchester Fire Ins. Co.*, 131 Mass. 173; May on Insurance, sec. 273.”

But counsel for appellant say that the two clauses of the policy thus brought together by the appellate court have no connection with each other,—that the latter clause relates exclusively to personal property. But it does not appear here that there is any specific insurance on personal property. The insurance is, “Five thousand dollars on the four-story and basement brick building, with metal roof, including steam-heating and hoisting apparatus, if any.” The fixtures included appear to be such only as savor of the realty, and would therefore pass with a conveyance of the building. There is, it will be observed, no mention made of personal property; and although the words “sold and delivered” would seem to be more applicable to personal than to real property, yet when they are used with reference to real property we have no difficulty in knowing what was intended. Reading the two clauses together, the conclusion is inevitable that it was intended that an alienation of the property, to avoid the policy, must be such that all interest or liability on the part of the assured therein named has ceased.

Bearing in mind that the manifest purpose of the clause is, as said by the supreme court of Connecticut, in the clause quoted from the opinion of the appellate court, *supra*, “that the interest shall not change so that the insured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and protecting it from

destruction by fire," it is difficult to perceive how the insured whose property has been illegally sold, and who is entitled to have the sale declared void, occupies a different position than that occupied by him who owns a mere equity of redemption. This court held, in *Roberts v. Fleming*, 53 Ill. 196, a trustee under a mortgage containing a power of sale cannot become a purchaser at his own sale, either directly or indirectly, by procuring another to purchase for his benefit; and if he does so become the purchaser, the rights of the mortgagor will remain precisely the same as though no sale had been made. The appellate court finds that such were the facts here, and so the interest of the insured remained, notwithstanding the sale, precisely as it was before.

In *Stephens v. Illinois Mutual Fire Ins. Co.*, 43 Ill. 327, there was insurance obtained by a mortgagor. The mortgage was foreclosed under an agreement that the mortgagor should have two years from the date of sale in which to make redemption, the decree itself, however, only providing for the statutory redemption. The property was destroyed by fire fourteen months and eight days after the sale. It was held the mortgagor had an insurable interest. The court said: "Notwithstanding, then, the decree directed a deed to be made at the end of fifteen months, it was the undoubted intention of the parties that the defendant should have two years for redeeming, and notwithstanding the commissioner's deed, if the defendants in that suit had tendered the redemption money to the complainants within the two years, and in case of refusal had filed their bill, there can be no question, on the proof in this record, but that they would have been entitled to a decree for redemption. . . . The legal title passed by the commissioner's deed, which was not made known till after the fire, but that legal title was held by the complainants, subject to a right of redemption within two years from the sale. . . . It is objected for the defendant in error that the insurance company was no party to the agreement to extend the redemption for two years, and cannot, therefore, be affected by it. The objection, however, is not tenable. The insurance company is sued on a policy. It defends by saying that the plaintiff, though he once had an insurable interest, has lost it through the foreclosure of a certain mortgage older than the plaintiff's title. Now, whether the plaintiff has lost his title must depend on the proceedings in the foreclosure and sale. To determine this question,

these proceedings are put in evidence, and on examining them we find this agreement as a very material portion of that transaction, which the company has itself introduced to show a divestiture of title. The company seeks to show that the right of redemption was lost under a judicial sale; but the evidence offered by it shows it was not lost."

And in *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 219, when the property was insured, Eddy was the only owner of the equity of redemption (Town then holding a mortgage on the premises), and the loss, if any, was payable to Town, as his interest might show. Subsequently, the insured (Eddy) conveyed the premises, with other property, to Brown, and he, at the same time, and as a part of the same transaction, gave back to Eddy a defeasance. This arrangement was made to enable Eddy to take up his mortgage to Town, which was done. It was held that this conveyance and defeasance only constituted a mortgage, and did not constitute an alienation of the property.

It is, however, contended that a sale which is merely voidable is such a change of title as defeats a recovery for a loss before the sale has been set aside, and this is claimed to be sustained by *Flanders on Fire Insurance*, 406, and *Wood on Fire Insurance*, sec. 513. The language of *Flanders* is: "And where property was sold under a decree of the court, and after a loss had occurred the sale was set aside, it was held that the insured could not recover." He refers to *Mt. Vernon Mfg. Co. v. Summit Co. Mutual Fire Ins. Co.*, 10 Ohio St. 347, *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 665, and *Dadmun Mfg. Co. v. Worcester Mutual Fire Ins. Co.*, 11 Met. 429. In the first of these cases, the point decided is thus stated in the *syllabus*: "Where personal property, insured against loss by fire in a mutual insurance company, is sold by a master in chancery, in pursuance of a decree upon a mortgage given by the assured, and the proceeds of such sale are, by order of the court, applied to the satisfaction, *pro tanto*, of such decree, and the property insured is afterwards burned, the assured cannot recover for the loss, although subsequently to such loss, and before the commencement of the action on the policy, the sale was, by consent of all parties thereto, set aside by order of the court under whose decree the sale was made." This is the reasoning of the court in its opinion, on page 364: "But two reasons are stated in the order for setting aside the sale: 1. That the purchase-money has not been paid; and 2. That all parties consented thereto. The first reason could

have no application to the sale of the personal property, for, there being no occasion for the payment of the purchase-money as to it, its non-payment could afford no reason for setting it aside. The consent of all parties may have been a good reason to justify the action of the court in setting aside the sale as to those parties, but we cannot rid ourselves of the impression that such action of the court, based upon and obedient to the will of parties, ought not to be permitted to affect the rights, previously fixed, of persons who were not parties, and whose interests were not consulted in the matter. It ought not to be in the power of the plaintiff, or of parties similarly situated, to escape the burden of assessments in case the injured property remained unscathed, and to insist on compensation in case of its destruction, at their mere will and pleasure."

In *Power v. Ocean Life Ins. Co.*, *supra*, it was merely decided that where the assured sells property covered by the policy, and afterwards takes it back on account of the non-payment of her vendee, and is in possession at the happening of the loss, she will recover, although a clause in the policy provides that it shall be void in case of transfer or assignment without the consent of the insurers. The court, speaking of the clause against alienation, says, on page 31: "The nullity mentioned in the clause relied on by defendants was, in our opinion, intended and understood by the parties for the case, where, by sale or otherwise, an absolute transfer or termination of the interest of the insured should take place so as to leave him without interest at the time of the loss."

In *Dadmun Mfg. Co. v. Worcester Mutual Fire Ins. Co.*, *supra*, the only point decided having any relevancy is, that a corporation having made a conveyance in violation of a clause in an insurance policy against alienation cannot be heard to say that such conveyance is void because fraudulent as to creditors.

Wood says: "A sale of premises or other property that is void from any cause is not an alienation within the meaning of the term as employed in the prohibitory clause of a policy; but a sale that is merely voidable is an alienation that defeats a recovery for a loss occurring before the sale has been set aside." And he refers to *Worthington v. Bearse*, 12 Allen, 382; 90 Am. Dec. 152; *Lane v. Maine Ins. Co.*, 12 Me. 44; 28 Am. Dec. 150; *Power v. Ocean Ins. Co.*, *supra*; *Hooper v. Hudson River Ins. Co.*, 17 N. Y. 424; *West Branch Ins. Co. v. Wellenstein*, 40 Pa. St. 289; 80 Am. Dec. 573.

This is the *syllabus* in *Worthington v. Bearse, supra*: "If a mortgagor of a vessel sells his remaining interest therein, with a stipulation that he will pay off the mortgage, and fails to comply with this stipulation, and the bargain is accordingly given up and the title reconveyed to him, a policy of insurance issued to him before his agreement of sale will be valid to cover a loss of the vessel after the reconveyance of the title to him."

In *Lane v. Maine Mutual Fire Ins. Co.*, which is reported in 12 Me. 44, 28 Am. Dec. 150, the point pertinent here is thus stated in the *syllabus*: "In a policy of insurance against fire, it was stipulated that 'when the property insured should be alienated, by sale or otherwise, the policy should thereupon be void.' The insurance was on a store, and two hundred dollars on the stock of goods therein, for six years. During the existence of the policy, the assured sold all the goods and leased the store by parol to the purchaser, who continued to occupy the same, selling the goods, for about six months, when the assured took back both the store and the remaining stock of goods: held, that this was not an alienation of the store within the meaning of the policy."

What is decided in *Power v. Ocean Ins. Co., supra*, has been already shown. *Hooper v. Hudson River Ins. Co., supra*, has no bearing on the question. It decides only that application to an insurer for his consent to the assignment of a policy is notice that the applicant has acquired, or is about to acquire, some interest in the subject of insurance, since without such interest an assignment would be valueless to him.

The only point decided in *West Branch Ins. Co. v. Welfenstein, supra*, that has any pertinency to the text in support of which it is cited, is: "In a policy obtained by a merchant upon his storehouse, and upon his stock of goods therein, each for a certain sum, there was a condition that in case of any transfer, partial transfer, or change of title in the property insured, such insurance shall be void and of no effect, etc. He afterwards sold a part of his stock, without notice to or consent of the company, and leased the lower story of his store to the purchasers, occupying himself the second story and the cellar with the balance of his stock, which, at the time of the fire, exceeded in value the insurance obtained on his goods: held, that he had not forfeited his right to indemnity by failing to give notice of the partial sale, but was entitled to recover the amount of his insurance, it being upon merchan-

dise which is to be used for traffic and commerce, and not as property to be kept unchanged. The admission, under lease, of the purchasers of part of the stock to the joint possession of the store building was not a breach of the covenant; for the condition forbidding the transfer or change of title in the property insured, without the assent of the company, does not include a lease, which changes only the possession."

Counsel for appellant cite on the same point, in addition to the foregoing, *Savage v. Howard Ins. Co.*, 52 N. Y. 502; 11 Am. Rep. 741; *Langdon v. Minnesota Farmers' Association*, 22 Minn. 193; *Footte v. Hartford Fire Ins. Co.*, 119 Mass. 259.

In *Savage v. Howard Ins. Co.*, *supra*, it was held, where a policy of insurance contains a condition that if the property be sold or transferred, or any change takes place in the title or possession, then the policy shall be void, a conveyance of the property avoids the policy, although simultaneously therewith a mortgage be taken back for the purchase-money. This is directly in opposition to our ruling in *Aurora Fire Ins. Co. v. Eddy*, *supra*.

In *Langdon v. Minnesota Farmers' Ass'n*, *supra*, where by the terms of a fire policy, the sale or transfer of the insured premises, or a change in the title thereof by voluntary transfer or conveyance, cuts off all right of recovery upon the policy, a conveyance of the premises by the insured and his wife to S., who reconveys to the wife, it was held operates to cut off such right of recovery, notwithstanding it appears that the conveyances were made as a substitute for a will devising the property to the wife, and that it was not the intention to divest the insured of the entire title, but that he was to retain, and did retain, possession and control of the property after the conveyances as before.

The ruling in *Footte v. Hartford Fire Ins. Co.*, *supra*, so far as affects the present question, is analogous to that in *Savage v. Howard Fire Ins. Co.*, *supra*, and is not more pertinent to the present question.

Not one of these cases, it will thus be seen, is analogous to the present case. In none of them is it held that a voidable deed, made by direction of a court or by a master in chancery, where the assured still has possession and the same interest in the property that he had before such deed was made, constituted an alienation of the property within the meaning of the clause under consideration.

It may be conceded that there is strong reason in favor of

holding, where a party has himself made a deed which he may avoid or not, as he shall elect, and a loss has occurred after he has made such deed, and before he has elected to avoid it, that such an alienation, under a clause like that under consideration, avoids the policy, and especially so where there are interests urging against its avoidance on the one side, as well as in favor of its avoidance on the other. But these reasons have no application here. Under the facts found by the appellate court, the case here, in brief, is simply this: A trust deed is made of property to secure a debt. Afterwards, the maker of the deed takes out a policy of insurance upon the same property, in which there is a clause prohibiting its alienation. The trustee, without his consent, and against his protest, sells the property to the *cestui que trust*. The maker of the trust deed is in possession when the deed is made, and remains in possession until after the sale, and until the property is destroyed by fire. He denies the validity of the sale, and asserts his right of possession and of ownership, and within a reasonable time institutes legal proceedings to set the sale aside. As to him, the sale is void, and he is entitled to redeem notwithstanding the sale, and his interest since the sale is therefore just as great as it was before. The same motives which can be presumed to have urged him to protect the property and preserve it from destruction before the sale urge him to protect and preserve it from destruction after the sale. The facts found place the value of the property at four times the amount bid for the property at the sale, and there is no question of over-valuation for the purpose of the insurance. In our opinion, it must follow that the deed of the trustee was not such an alienation as is within the reasonable contemplation of the clause under consideration.

The judgment is affirmed.

INSURANCE. — ALIENATION DEFEATING CLAIM FOR INSURANCE: See extended note to *Lane v. Maine M. F. Ins. Co.*, 28 Am. Dec. 154-159, including a discussion of the mortgaging of insured property, pages 156, 157. Mortgagor and mortgagee of insured property, respective rights of, etc.: See extended note to *King v. State M. F. Ins. Co.*, 54 Am. Dec. 693-700. General discussion of the condition against alienation in a policy of insurance, and its incidents: Extended note to *Morrison v. Insurance Co.*, 59 Am. Dec. 304-312.

INSURANCE. — MORTGAGEE HAS AN INSURABLE INTEREST IN THE MORTGAGED PROPERTY: *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; 55 Am. Dec. 546; *Bell v. Western etc. Ins. Co.*, 5 Rob. (La.) 423; 39 Am. Dec. 542; *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377; 9 Am. Rep. 41; *Foster v. Van Reed*, 70 N. Y. 19; 26 Am. Rep. 544. Character and nature of insurance by mortgagee: *King v. State M. Ins. Co.*, 7 Cush. 1; 54 Am. Dec. 683, and

note 693. Insurance may be severally effected by both mortgagor and mortgagee without the insurance of either impairing that of the other: *Jackson v. Insurance Co.*, 23 Pick. 418; 34 Am. Dec. 69.

TRUSTS AND TRUSTEES. — TRUSTEES ARE INCAPABLE OF PURCHASING TRUST PROPERTY FOR THEMSELVES: *Remick v. Butterfield*, 31 N. H. 70; 64 Am. Dec. 316; *Tisdale v. Tisdale*, 2 Sneed, 596; 64 Am. Dec. 775; *Chorpenning's Appeal*, 32 Pa. St. 315; 72 Am. Dec. 780; *Greenley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304; and notes to *Gardner v. Ogden*, 78 Am. Dec. 211; *Jewett v. Miller*, 61 Am. Dec. 756; *Bank of Old Dominion v. Dubuque etc. R. R. Co.*, 74 Am. Dec. 304; *Smith v. Townshend*, 92 Am. Dec. 641. A trustee cannot purchase at a public sale, where the trust estate is interested in having the property bring its highest price; and the rule applies not only to trustees, but to all persons interested in a fiduciary capacity, or invested with fiduciary power. In such cases, the presumption of invalidity is conclusive, and the sale always voidable, unlike that class of cases where the trustee and the *cestui que trust* intentionally deal with each other, each knowingly taking a part in the transaction, and where the presumption of invalidity is only presumptive, and may be rebutted: *Price v. Thompson*, 84 Ky. 219. A trustee cannot purchase from himself, either directly or indirectly, and if he attempts to do so, the sale will be voidable, at the election of the beneficiary; but a trustee may purchase from the beneficiary himself, if the transaction is fair in all respects: *Golson v. Dunlap*, 73 Cal. 157. So in Illinois it was held that a trustee, or one acting in a fiduciary capacity, could not become a purchaser at his own sale, either directly or indirectly, whether the sale be one made by himself or under a decree of court, or whether any fraud was actually intended or not: *Borders v. Murphy*, 125 Ill. 577. But in Alabama it has been held that an executor or administrator may become the purchaser at his own sale when he has an interest in the property sold, if the sale is made in the ordinary mode, and there is no unfairness whatever; and the rule holds good at a sale under a decree in chancery on a bill filed by the executor or administrator: *Penny v. Jackson*, 85 Ala. 67. In Texas, a trustee or an executor may purchase from the *cestui que trust* or the heir, but he must pay a full, fair, and adequate consideration, for if there is any concealment of the real value of the purchased property, or any fraud whatever, the sale will be set aside: *Hickman v. Stewart*, 69 Tex. 255. In Pennsylvania, it is a well-established rule that a trustee will not be allowed to purchase the trust property at his own sale, unless by the leave of court by him first obtained: *Patterson v. Lennig*, 118 Pa. St. 571.

MARTIN v. STUBBINGS.

[128 ILLINOIS, 887.]

APPEAL DOES NOT LIE TO SUPREME COURT WHERE AMOUNT INVOLVED IS LESS THAN ONE THOUSAND DOLLARS, unless there is a certificate by the judges of the appellate court that the case involves questions of law of such importance that it should be passed upon by the supreme court. **BALANCE DUE FROM PARTNER TO HIS COPARTNER IS SUFFICIENT CONSIDERATION** for a note given for such balance, and for an assignment of a certificate of membership in a mutual benefit society to secure the same, where the firm has been dissolved and the amount due from such partner to his copartner has been ascertained and agreed upon.

EXECUTION OF NEW ARTICLES OF COPARTNERSHIP IS SUFFICIENT CONSIDERATION to support the execution of a note, as surety, by the wife of one of the partners given by said partner for an indebtedness ascertained and agreed to be due from him to his copartner upon the dissolution of a prior partnership between them.

EXTRINSIC EVIDENCE IS ADMISSIBLE TO SHOW CONSIDERATION of a note, when the note recites no particular consideration.

MUTUAL BENEFIT SOCIETY IS NOT LIFE INSURANCE COMPANY, nor is its certificate of membership a policy of life insurance, within the restricted sense of those terms used in the statute relating to life insurance companies, but such certificate is in the nature of a mutual life insurance policy, and such contracts are, therefore, subject to the rules of law governing life insurance policies, except so far as those rules must be held to be modified by the peculiar organization; objects, and policy of such societies.

PERSON HAVING INSURED HIS OWN LIFE MAY ASSIGN POLICY and provide for the payment of the insurance money to an assignee who has no insurable interest in his life, notwithstanding the general rule that no person can procure a valid insurance on the life of another unless he has an insurable interest in such life; and *a fortiori* may a creditor who has an insurable interest in the life of his debtor make such an assignment.

BENEFICIARY NAMED IN CERTIFICATE OF MEMBERSHIP OF MUTUAL BENEFIT SOCIETY ACQUIRES NO VESTED RIGHT to the benefit to accrue upon the death of the member until such death occurs, and the member may, therefore, during his lifetime, exercise the power of appointment without other limits or restrictions than such as are imposed by the organic law of the society or the rules and regulations adopted in conformity therewith.

MEMBER OF MUTUAL BENEFIT SOCIETY MAY ASSIGN HIS CERTIFICATE OF MEMBERSHIP TO HIS CREDITOR, where the statute under which the society was organized, and which the constitution of the society followed, empowers the member to name as his beneficiary his legatee or devisee without restriction. The mode of selection is mere matter of form, and does not go to the substance of the right to select beneficiaries. The failure of the member to adopt the mode prescribed by the statute, by executing a will making the assignee his legatee, might be a matter of which the society could object, but if the society does not object, the widow of the member, who was the original beneficiary named in the certificate, has no rights in the certificate which can justify her in interposing an objection to a decree of the court ordering payment to be made to the assignee to the extent of his debt.

BILLS in chancery. The first was a bill of interpleader brought by the Knights Templars and Masons' Life Indemnity Company against Cornelia Martin and Wilson H. Stubbings, praying that the defendants be required to interplead as to their rights to receive a certain sum of money admitted by the complainant to be due from it on a membership certificate issued by it to Neal K. Martin, the deceased husband of Cornelia Martin. The other was a bill in the nature of a

bill for specific performance, brought by Stubbings against the Supreme Council of the Royal League and Cornelia Martin, praying that said council be required to levy a mortuary assessment upon its members surviving at the death of said Neal K. Martin to raise a fund to pay the amount payable on a certificate of membership issued by it to said Martin in his lifetime, and to pay over said money, when raised, or a part of it, to the complainant. Upon the first bill a decree was rendered directing the whole amount due from the company to be paid to Stubbings. In the second suit a decree was made directing \$474.76 to be paid to Stubbings, and \$548.52 to be paid to Cornelia Martin. Mrs. Martin took both decrees to the appellate court, where they were affirmed, whereupon she brought them to this court. The Knights Templars and Masons' Life Indemnity Company is a mutual benefit society, organized under the act of July 1, 1883. Other facts appear from the opinion.

Millard R. Powers and Robert S. Iles, for the plaintiff in error.

Hoyne and Follansbee, for the defendant in error.

BAILEY, J. The amount involved in the case of *Stubbings v. Supreme Council of the Royal League and Cornelia Martin* is only \$474.76. It is true, the amount found due from the Supreme Council of the Royal League on the membership certificate of Neal K. Martin, deceased, was \$1,023.28, but of that sum \$548.52 was ordered to be paid and was in fact paid to Cornelia Martin, and only \$474.76 was ordered to be paid to Stubbings. The Supreme Council of the Royal League is not complaining, the writ of error having been sued out by Cornelia Martin alone. As between her and Stubbings, the only parties to the present controversy, only \$474.76, or less than \$1,000, is involved. There is no certificate by the judges of the appellate court that the case involves questions of law of such importance, either on account of principal or collateral interests, that it should be passed upon by this court. It follows that in that case the writ of error was improvidently issued, and it must therefore be dismissed.

In the other case, the one involving the certificate of membership in the Knights Templars and Masons' Life Indemnity Company, Mrs. Martin bases her right, as against Stubbings, to receive the money payable on said certificate on two grounds: 1. That there was no sufficient legal consideration

to support either the note executed by her and her husband to Stubbings, or the assignment to him of the certificate of membership; and 2. That during Martin's lifetime said certificate was not assignable so as to vest in the assignee the right to receive the money payable thereon at Martin's death.

In support of the first of these propositions, counsel have sought to avail themselves of the principles discussed and adopted by the appellate court when the case was before that court on motion to vacate the judgment against Mrs. Martin entered on said note by confession: See *Martin v. Stubbings*, 20 Ill. App. 381. In that case, it will be observed, the decision was based upon the facts established by certain *ex parte* affidavits, which, for the purposes of the decision, the court was compelled to take as true. The facts thus shown were, among others, that at the time the note was given the partnership had not been dissolved, but continued after its execution, and was dissolved only by the subsequent death of Martin; that no accounting took place, and no balance was struck in Martin's lifetime; that the consideration of the note was an estimated balance which was not arrived at by any accounting, and was not regarded or treated by the parties as the true balance, but was subject to correction when an accounting should be had and a balance ascertained. A state of facts entirely different, and calling for an application of entirely different rules of law, was presented by the pleadings and proofs at the hearing in the present case. That the partnership was in fact dissolved at the time the note was given is now placed beyond the possibility of question by the express covenant of the parties in their new articles of co-partnership that such was the case. It also appears without contradiction that a most careful and thorough accounting was had in respect to all the business of the firm down to January 1, 1886, which showed that Martin, who contributed nothing to the capital of the firm, and whose interest was only in the profits, had drawn out his entire share of the profits, and the sum of \$3,411.66 in addition thereto. Had the firm been dissolved January 1st, Martin would, according to the accounting, have been indebted to Stubbings in the sum above mentioned. The evidence fails to show whether or to what extent the accounts between the parties were affected by the firm business transacted between January 1st and April 16th, the date of the new partnership agreement, but the presumption may be indulged in that very little, if any, business was

transacted during that interval. However that may be, it was clearly competent for the parties, on dissolving their copartnership, to agree upon the balance due, if they saw fit to do so, without a new accounting. It was competent for them to adopt the balance of January 1st as the true one, and disregard subsequent transactions, and this they are clearly shown to have done. The firm being dissolved, and the amount due from Martin to Stubbings being ascertained and agreed upon, such balance constituted an individual indebtedness from Martin to Stubbings, which was a sufficient consideration both for the note and for the assignment of the certificates of membership.

But this is not all. The execution of the new articles of copartnership was a consideration sufficient to support Mrs. Martin's execution of the note as surety. It should be observed that the note recites no particular consideration, and it is therefore admissible in order to establish the liability of any of the parties to it, to resort to extrinsic evidence to show a consideration: See *Martin v. Stubbings*, 27 Ill. App. 121, and authorities there cited. The execution of the note by Martin and wife, and the deposit with Stubbings of Martin's certificates of membership as collateral security, was the inducement to Stubbings to consent to a new copartnership, instead of terminating his business relations with Martin peremptorily and at once. There can be no doubt that the note and collaterals were given to obtain a renewal of the partnership relation, and such renewal, coupled with the existing and admitted indebtedness from Martin to Stubbings, was a sufficient consideration for Mrs. Martin's signature and for the deposit of the collaterals.

The question remains, whether the certificate of membership in the Knights Templars and Masons' Life Indemnity Company was assignable in Martin's lifetime so as to vest in the assignee the right to receive the money payable thereon at Martin's death. This question is, we think, substantially settled by the decision of this court in *Bloomington Mutual Benefit Ass'n v. Blue*, 120 Ill. 121; 60 Am. Rep. 558. Counsel, however, have seen proper to reargue it at considerable length, and we have therefore been disposed to reconsider the question in the light of the numerous authorities to which our attention is now directed.

It should be observed that the question comes up here in a somewhat different form from the one presented in the case

last cited. There the controversy was between the mutual benefit society and the person to whom the fund, by the terms of the membership certificate, was made payable. The society denied its liability, on the ground that the person to whom the money was appointed to be paid was not one of those enumerated by the statute as proper beneficiaries. Here the society admits its liability, and the only question now is, to which of two parties, the assignee or the widow, the money admitted to be due shall be paid. The court has decreed it to the assignee, and the decree must be affirmed, unless the widow has succeeded in establishing a better title. She being the only one complaining, if she has failed to prove title to the money, it is quite unimportant here what disposition the court has made of it, since no one having a right to do so is calling such disposition in question.

A mutual benefit society is not a life insurance company in the restricted sense in which that term is used in our statute in relation to life insurance companies, nor is a certificate of membership in such society a policy of life insurance in the same restricted sense of the term, yet it is manifest that such membership certificate is in the nature of a mutual life insurance policy: *Commonwealth v. Wetherbee*, 105 Mass. 161; *State v. Merchants' Ex. Mut. Benevolent Society*, 72 Mo. 146; *Supreme Commandary Knights of Golden Rule v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332; *Sherman v. Commonwealth*, 82 Ky. 102; *State v. Vigilant Ins. Co.*, 30 Kan. 585; *State v. Northwestern Mutual Live Stock Ass'n*, 16 Neb. 549; *State v. Farmers' Mutual Benefit Ass'n*, 18 Id. 276; *Illinois Masons' Benevolent Society v. Winthrop*, 85 Ill. 537; *Illinois Masons' Benevolent Society v. Baldwin*, 86 Id. 479; Niblack on Mutual Benefit Societies, 193. Such contracts are therefore subject to the rules of law governing life insurance policies, except so far as those rules must be held to be modified by the peculiar organization, objects, and policy of such societies.

While it is a general rule that no person can procure a valid insurance on the life of another unless he has an insurable interest in such life, policies issued where there is no such interest being deemed to be mere wager policies, yet the rule seems to be, that a person having insured his own life may, by an assignment of the policy, provide for the payment of the insurance money to an assignee who has no insurable interest in his life: See authorities cited in *Bloomington Mutual Benefit Ass'n v. Blue*, *supra*. *A fortiori* may he make such

assignment to a person having such insurable interest. In this case, Stubbings was a creditor of Martin, and so had an insurable interest in his life: Bliss on Life Insurance, secs. 13, 27. He might have taken out a policy of insurance directly on the life of his debtor, and there can therefore be no doubt that had the case been one of an ordinary life policy taken out by Martin on his own life and for his own benefit, the assignment of such policy by him to Stubbings would have been perfectly valid, and would have vested in the latter the right to receive the insurance money at Martin's death.

If any different rule applies in this case, such rule must find its basis either in the terms of the contract evidenced by the certificate of membership, or in the provisions or policy of the statute under which the certificate of membership was issued. It must be admitted that there is neither in the statute nor contract any express prohibition of an assignment by a member of his certificate of membership to his creditor so as to constitute such creditor a beneficiary of the fund payable at the member's death. But the position taken by counsel is, that the policy of the statute is to limit the persons who may become beneficiaries to certain enumerated classes, and that such limitation is implied in the provisions both of the statute and contract.

Most of the decisions seem to concur in holding that, in case of mutual benefit societies, the beneficiary named in the certificate of membership acquires no vested right to the benefit to accrue upon the death of the member until such death occurs. The member may therefore, during his lifetime, exercise the power of appointment, without other limits or restrictions than such as are imposed by the organic law of the society or the rules and regulations adopted in conformity therewith: *Masonic Mutual Benefit Society v. Burkhart*, 110 Ind. 189; *Presbyterian Mutual Assurance Fund v. Allen*, 106 Id. 593; *Splawn v. Crew*, 60 Tex. 532; *Johnson v. Van Epps*, 110 Ill. 551; Niblack on Mutual Benefit Societies, sec. 201. All the beneficiary has during the lifetime of the member, owing to the member's right of revocation, is a mere expectancy, dependent upon the will and act of the holder of the certificate. Cases where a different rule has been announced seem to be confined to those where the organic law of the society prohibits a change in the beneficiary first designated.

In the present case, the power of revoking or changing the appointment of the beneficiary was reserved to Martin by the

terms of the contract in the broadest possible manner. By his application for membership, Mrs. Martin was designated as beneficiary, unless he should otherwise order in his lifetime or by his will, and in substantial compliance with the application, the certificate named as beneficiaries his widow, children, or heirs, in the order named, unless otherwise ordered by him during his lifetime or by his will. The constitution of the society, which was incorporated into and made a part of the certificate of membership, provided that any member having designated his beneficiary or beneficiaries might change the same at his pleasure, without notice to or consent of the beneficiary or beneficiaries, and that all accepting any interest in the certificate or the society did so upon those express terms. Under these circumstances, it is perfectly clear that Mrs. Martin had no vested interest or property rights in the certificate of membership, or the moneys to become payable thereunder, during the lifetime of her husband, and that the certificate, at the time it was assigned to Stubbings, was subject to the absolute control of Martin, and that it was then in his power, either with or without the consent of his wife, to make any disposition of it which did not conflict with the terms of the contract itself, or the organic law of the society.

Was there either in the statute under which the society was organized, or in the constitution of the society, an implied limitation or restriction upon Martin's power of appointment of beneficiaries which made it unlawful for him to assign the certificate to his creditor as security for his debt? The first section of the statute under which the society was organized provides for the organization of corporations, associations, or societies for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs, or relatives by consanguinity or affinity, devisees or legatees of deceased members, and the constitution of the society, in enumerating the objects for which the society was organized, follows precisely the language of the statute. It cannot be contended that Stubbings could by any possibility be included within the meaning of the terms, "widow, orphans, heirs, or relatives by consanguinity or affinity," nor can he be properly classed as a "legatee or devisee," as he could be made such only by Martin's will.

It is clear, however, that the statute, by empowering a member to name as his beneficiary his legatee or devisee, without

restriction, proceeds upon a policy much broader than do those statutes which limit the benefits to accrue upon the death of the member to his relatives or those in some way dependent upon him. Under the name of legatee or devisee, the member is given the power to appoint as his beneficiary any person, however related to him, or not related to him at all. He may, in the selection of his beneficiary, be governed by considerations of affection or duty, or he may yield to the dictates of mere caprice, subject only to the limitation that the appointment be made by will. The legislature having thus enlarged the category of those capable of being selected as beneficiaries so as to include all persons whom the member may see fit to select as his legatees or devisees, we can perceive no substantial rule of public policy which would be violated by the adoption of a different mode of selection of a beneficiary. No substantial rights of any party are better secured or protected by one mode of appointment than by another. The mode of selection is mere matter of form, and does not go to the substance of the right to select beneficiaries.

We are aware that upon the general proposition we are discussing the decisions of the courts are not altogether harmonious, and that some courts of high respectability have reached a different conclusion. Those decisions, however, so far as we have been able to examine them, seem to be based upon statutes essentially different from ours. Thus *Briggs v. Earl*, 139 Mass. 473, was a case arising under a membership certificate where the purposes for which the society could be formed were strictly limited by statute to rendering assistance to the widows and orphans of deceased members and the persons dependent upon them. It was there held that an assignment of the membership certificate as security for a debt was invalid. In *Dietrich v. Madison Relief Ass'n*, 45 Wis. 79, the charter of the association declared that its business should be to afford relief to the widows and children of deceased members, and that to such business it should be limited and restricted, and it was held that an assignment by a member of his membership certificate to the association to secure a debt which he owed to it was void by reason of the want of authority in the association to take it. Authorities of the class to which the foregoing belong manifestly have no application here.

The assignment of the certificate of membership to Stubbings is not within the strict letter of the statute, but in the

absence of all negative words forbidding the appointment of a beneficiary in any other mode than the one prescribed, the assignment to him is not necessarily unlawful, and therefore void. He was a person capable, under the statute, of becoming a beneficiary, and the absolute right of naming him as such was in Martin. His failure to adopt the mode prescribed by the statute—that is, by executing a will making Stubbings his legatee—was doubtless a matter of which the society could probably object; but Mrs. Martin had no rights in the certificate which could justify her in interposing an objection. She was, to all intents and purposes, a stranger to the transaction. Her rights could arise only upon the death of Martin, and then only in case he had wholly failed to make a valid and effectual appointment of another beneficiary in her place.

It cannot be doubted that Martin, at any time before his death, so long as the membership certificate was his property, and subject to his absolute dominion and control, might have surrendered it to the company for cancellation. If he had done so, his wife would have had no legal ground of complaint. The power of designating his beneficiaries being wholly under his control, he had the power of determining who should not as well as who should be such beneficiaries. In making the assignment of the certificate to Stubbings, he appointed him to receive the benefit to accrue at his death to the extent of the debt due him, and by the same act he revoked the appointment of Mrs. Martin as a beneficiary to the same extent. She, being no longer a beneficiary, has no interest which can give her a standing to contest the validity of the assignment to Stubbings; and the society having recognized the validity of said assignment, and professed a willingness to pay the money to him, there was no error of which Mrs. Martin can complain in the decree of the court ordering such payment to be made.

We find no error in the record, and the judgment of the appellate court will therefore be affirmed.

PARTNERSHIP. — THE MAKING OF A PROMISSORY NOTE BY SEVERAL PARTNERS IN FAVOR of another partner is an acknowledgment of the separation of the sum mentioned therein from the partnership account, and such partner may recover at law against his copartners on such note: *Bonnaffe v. Fessner*, 6 Smedes & M. 212; 45 Am. Dec. 278.

LIFE INSURANCE — ASSIGNMENT OF POLICY. — THE ASSIGNEE OF A POLICY OF LIFE INSURANCE cannot recover on the policy where he had no in-

insurable interest in the life of the insured: *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93; 26 Am. Rep. 761; and this rule holds good even when the assignment was made with the consent of the company: *Franklin L. Ins. Co. v. Hamard*, 41 Ind. 116; 13 Am. Rep. 313; but in Rhode Island, the assignment of a life insurance policy outstanding and valid, and containing no prohibition of such assignment, is good, though made to one who has no interest in the life of the insured, provided such assignment is a *bona fide* transaction, and not a device to evade the law: *Clark v. Allen*, 11 R. I. 439; 23 Am. Rep. 496; a policy on one's own life, the premiums being fully paid, or nearly so, may be effectually assigned by him to any person having no insurable interest in his life: *Bursinger v. Bank of Watertown*, 67 Wis. 75; 58 Am. Rep. 848, and note 852. An assignment to a surety on one's official bond of a policy of life insurance is valid and good: *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192, and note 196. For full discussion of when an assignment of an insurance policy is valid, and what constitutes such an assignment, see extended note to *New York Life Ins. Co. v. Flack*, 56 Am. Dec. 747-755.

MUTUAL INSURANCE COMPANIES DIFFER ESSENTIALLY FROM STOCK INSURANCE COMPANIES: *Baxter v. Chelsea M. F. Ins. Co.*, 1 Allen, 294; 79 Am. Dec. 730.

BLANCHARD v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[126 ILLINOIS, 416.]

EVIDENCE REVIEWED BY SUPREME COURT, WHEN. — Where the trial court instructs the jury to find for the defendant, or, what is the same thing, sustains a demurrer to the evidence, such action is the same as holding that the evidence is insufficient in law to sustain the action, even if all that it tends to prove is admitted to be true; and when such action is assigned for error, the supreme court will look into the evidence in order to determine whether or not the ruling was correct.

PERSON WALKING ON RAILROAD TRACK, NOT AT PUBLIC CROSSING, IS TRESPASSER, and guilty of gross negligence, where he is doing so for his own convenience, and not on any business of the railroad company; and if he is run over by a train and killed, the company will not be liable in damages for his death, unless it was willfully or wantonly caused, or unless the company is chargeable with such gross negligence as evidences willfulness.

NO IMPLIED ASSENT TO USE OF RAILROAD TRACK FOR WALKING THEREON CAN BE INFERRED from the fact that the company has not prohibited or interfered with a custom on the part of persons in the locality to make use of the track for that purpose.

FACT THAT RAILWAY TRAIN WAS RUNNING AT GREATER SPEED THAN WAS PERMITTED by a city ordinance at the time when it struck and killed a person walking on the track may be considered by the jury in determining whether the company was guilty of such negligence as caused the death of the deceased, but it will not relieve him from the exercise of ordinary care, nor will the speed of the train alone furnish a sufficient reason for holding that the injury was willful or wanton.

CITY ORDINANCE REQUIRING LOCOMOTIVE BELL TO BE RUNG continually while the engine is running within the city is not admissible in evidence on the trial of an action for the killing of a person who was walking on the track, where the existence of such ordinance is not alleged, or its violation charged, in the declaration.

STATUTE REQUIRING LOCOMOTIVE BELL TO BE RUNG AT DISTANCE OF EIGHTY Rods from a street crossing does not apply to a street over which no travel passes, except upon a viaduct far above and out of the way of the tracks.

BURDEN OF PROOF IS UPON PLAINTIFF, IN ACTION TO RECOVER FOR PERSONAL INJURY on the ground of the defendant's negligence, to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part. If his own evidence shows that he brought the injury on himself by his own carelessness, the plaintiff may be nonsuited.

COURT SHOULD DIRECT JURY TO FIND FOR DEFENDANT, where, if the case were submitted to them and a verdict for the plaintiff returned, it would have been the duty of the trial court to set the verdict aside.

ERROR WHICH WORKS NO HARM IS NOT GROUND FOR REVERSAL.

ACTION on the case. The opinion states the facts.

Thomas Dent and William P. Black, for the appellant

Pliny B. Smith, for the appellee.

MAGRUDER, J. This is an action on the case, brought, under the act of February 12, 1853, "requiring compensation for causing death by wrongful act, neglect, or default," to recover damages for the death of John W. Riordan, alleged to have been caused by the carelessness and improper conduct of the appellee company. The suit was begun in the superior court of Cook County in August, 1883, and after the first trial, which resulted in a verdict for the plaintiff, was appealed to the appellate court by the railroad company, and reversed and remanded. After it was so reversed and remanded, the plaintiff filed an additional count on April 20, 1887, alleging that the defendant ran the engine which caused the death of the deceased at a greater rate of speed than was permissible under the ordinance of the city of Chicago forbidding passenger trains to run faster than ten miles an hour, and freight trains to run faster than six miles an hour within the city limits, and that, when the accident occurred, the defendant was running its engine at the rate of fourteen miles an hour, and had no watch or lookout upon the engine so as to provide for the safety of persons who might be upon the track, etc.

The declaration, as originally filed, contained four counts; the first and second charged generally the careless and improper management of the engine; the third alleged the failure

to ring a bell or blow a whistle, as required by the statute, when within eighty rods of a street-crossing; the fourth charged that the engine was running at the rate of fourteen miles an hour, in violation of the ordinance aforesaid. This fourth count is substantially the same as the additional count filed after reversal, except that the latter alleges a failure to keep and maintain a watch or lookout upon the engine, and charges the defendant with a "wanton and reckless disregard of its duty," and with "negligent, unlawful, and wanton misconduct."

The defendant below pleaded the general issue to all the counts, and also a plea of the statute of limitations of two years to the additional count. The trial court overruled plaintiff's demurrer to the latter plea, and held the plea to be good, to which ruling plaintiff excepted. Judgment was entered for the defendant upon the plea of the statute of limitations, to which also plaintiff excepted.

Upon the second trial before a jury, after the plaintiff had introduced his evidence, the defendant orally demurred thereto and moved for an instruction to the jury to find for the defendant. The court thereupon instructed the jury, in writing, as follows: "The jury are instructed that, under the evidence in this case, their verdict must be for the defendant." The plaintiff excepted to this instruction and to the withdrawal of the case from the jury. Verdict was rendered for defendant, judgment entered upon the verdict, and exception taken by the plaintiff. The judgment of the trial court has been affirmed by the appellate court, and the case is brought before us by appeal from the latter court.

Where the jury are instructed to find for the defendant, or, what is the same thing, where a demurrer to the evidence is sustained, such action of the court is the same as holding that the evidence is insufficient in law to sustain the action, even if all that it tends to prove is admitted to be true: *Doane v. Lockwood*, 115 Ill. 492. In order, therefore, to determine whether the court in this case properly instructed the jury to find the issues for the defendant, it becomes necessary to look into the evidence.

The deceased was killed on December 15, 1882. He was sixteen or seventeen years old, and on the day of his death, and for about three months prior thereto, was at work in the freight-house of the Chicago and Northwestern Railway Company. This freight-house was located in the west division of

the city of Chicago, between Meagher Street on the north and Sixteenth Street on the south, and between Jefferson Street on the east and Union Street on the west. Its eastern end fronted on Jefferson Street, and it extended westward for about 400 feet towards Union Street, its western end being about 125 or 150 feet east of Union Street. South of it, and extending from Jefferson Street to Union Street, was the freight-house of the Chicago, Burlington, and Quincy Railroad Company. The next street west of Union was Halstead Street. Between Union and Halstead streets was the round-house of the Chicago, Burlington, and Quincy Railroad Company, standing to one side and out of the way of the railroad tracks. Newberry Avenue is the street next west of Halstead Street, and Johnson Street is the next street still farther to the west. South of Sixteenth Street and parallel with it is Seventeenth Street, which runs east and west. The deceased lived on Seventeenth Street between Newberry Avenue and Johnson Street, and nearer to the latter than the former.

The two blocks between Jefferson and Halstead streets on the east and west, and Meagher and Sixteenth streets on the north and south, are covered with railroad tracks, there being some twenty-five or thirty of such tracks. They run from east to west. They cross Jefferson and Union streets. Some of them run between the freight-houses of the two roads. The northern tracks towards Meagher Street are owned by the Chicago and Northwestern Railway Company and the southern tracks towards Sixteenth Street by the Chicago, Burlington, and Quincy Railroad Company. One or two tracks run into the western end of the Northwestern freight-house, and one or more tracks north of it and one or more south and along side of it.

At Halstead Street there is a bridge or viaduct, which is a part of the street. The railroad tracks and the engines and cars on them run under this bridge, and the public travel passes on it above the tracks and trains.

At twelve o'clock on December 15th, the deceased came out of the western end of the Northwestern freight-house to go home to his dinner. He went westward across Union Street upon the Northwestern tracks to a point between Union and Halstead streets, then turned south to the Chicago, Burlington, and Quincy tracks, and was walking along the northern track of the Chicago, Burlington, and Quincy road, or diagonally across it, when he was struck and killed by an engine of the

appellee, backing "tender first" on the Chicago, Burlington, and Quincy track towards the west. The accident occurred at a point about two feet east of the viaduct.

The deceased was not struck at a street crossing, but while upon the railroad track between Union Street and the Halstead Street viaduct. At Halstead Street, foot-passengers did not cross the tracks as at Union and Jefferson streets, but passed above them upon the bridge. The proof shows that, in this network of tracks, cars and engines are constantly passing and repassing. The tracks do not run along either Meagher or Sixteenth Street, but upon the space between them. The deceased might have done as his father did, who came out of the freight-house with him. He might have turned southward upon Union Street and then westward on Sixteenth Street, and in this way would have avoided walking along the tracks. His intention was either to walk along upon the track westward to Newberry Avenue and then turn southward to Seventeenth Street, where he lived, or to cross the tracks near the east side of the Halstead Street viaduct, moving southward so as to strike Sixteenth Street. In either case he was not where he had a right to be.

It is clear that, under the doctrine laid down by this court in *Ill. Cent. R. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112, and *Ill. Cent. R. R. v. Hetherington*, 83 Ill. 510, the deceased was a trespasser upon the right of way of the railroad company. He was walking along the railroad track, or trying to cross the tracks in a diagonal direction, at a point where there was no regular street crossing, and where foot-passengers could not lawfully go. He was not so traveling upon any business connected with the railroad. It is true that he was employed in the freight-house of the Chicago and Northwestern Railroad Company as an assistant "freight caller," but when he was killed he was walking on the tracks of the Chicago, Burlington, and Quincy Railroad Company, using them for his own convenience in going to his home to get his dinner.

The plaintiff introduced some testimony tending to show that for a number of years the workmen in the freight-houses who lived west of the Halstead Street viaduct had been in the habit of walking upon the tracks under the viaduct at the noon hour in order to reach their homes for dinner by a shorter route, and that this custom had never been prohibited or interfered with by the railroad companies. It is therefore claimed that the deceased was on the tracks by the implied permis-

sion of the railroads, and cannot be regarded as a trespasser. But this precise question was decided adversely to the claim thus made in the Godfrey case. It was there said: "The plaintiff was traveling upon defendant's right of way for his own mere convenience. There was nothing to exempt him from the character of a wrong-doer and trespasser in so doing, further than the supposed implied assent of the company, arising from their non-interference with a previous like practice by individuals. But because the company did not see fit to enforce its rights and keep people off its premises, no right of way over its ground was thereby acquired." The Godfrey case was referred to and indorsed in the Hetherington case, where it was said: "The deceased, when injured, was walking upon the right of way of the railroad company for pleasure. She occupied the position of a trespasser. The fact that persons residing in the locality where the accident occurred had been in the habit of traveling upon the right of way of the defendant, and no measures had been taken to prevent it, did not change the relative rights or obligations of the deceased or the railroad company."

Under the authorities cited, we think that the deceased was guilty of gross negligence in walking upon the track at the place above described. This being so, no recovery can be had in this action, unless the death of the deceased was "willfully or wantonly" caused by the defendant, or unless the defendant is chargeable with such "gross negligence as evidences willfulness." In the Godfrey case it was held as follows: "Notwithstanding the plaintiff was unlawfully upon defendant's right of way, yet the defendant might not, with impunity, wantonly or willfully injure him. And if defendant's servants who were in the management of the engine, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid injuring him, defendant might be liable." In the Hetherington case it was also said: "Where a person voluntarily and without authority undertakes to travel upon a railroad track, he ought not to recover damages for an injury received, unless it was wanton and willful."

The plaintiff in this case has not shown that the conduct of the defendant or its servants was wanton or willful. The proof tends to show that the engine was moving at a rate of speed greater than that permitted by the city ordinance. This circumstance might well have been considered by the jury in determining whether the defendant was guilty of such negli-

gence as caused the death of the deceased, if the latter had been lawfully upon the track, or had otherwise been in the exercise of ordinary care. But in the Hetherington case the following language was used: "While it is true the railroad company was running its train at a greater rate of speed than allowed by the ordinance of the city of Chicago, yet that fact did not relieve the deceased from the exercise of ordinary care, nor can the speed of the train alone be regarded as furnishing a sufficient reason for holding that the injury was willful or wanton."

The plaintiff offered to introduce in evidence section 1836 of the Municipal Code of Chicago, which reads as follows: "That the bell of each locomotive-engine be rung continually while running within said city." This was properly excluded by the trial court, because there was no allegation in the declaration that there was such a requirement of the city code, and therefore defendant had not been charged with a breach of it: *Illinois etc. R. R. Co. v. Godfrey, supra*. The only allegation upon this subject in the declaration is, that no bell of thirty pounds' weight was rung at the distance of eighty rods from the crossing. This has reference to a requirement of the statute. The evidence does not show a violation of this statutory provision. If it were true that such a bell was not rung at a distance of eighty rods from Halstead Street, it cannot be said that Halstead Street was a crossing, because, as already stated, no travel passed over the tracks at that street except upon the viaduct far above and out of the way of the tracks.

The proof does not show that defendant's servants who were in the management of the engine failed to use ordinary care to avoid striking him.

We do not think that the trial court erred in instructing the jury to find for the defendant. The defendant introduced no evidence. There was no conflict in the testimony. "Admitting all the testimony tends to prove," we have no hesitation in saying that plaintiff did not establish a right to recover: *Chicago etc. R'y Co. v. Lewis*, 109 Ill. 120. It was incumbent on him to prove that the deceased was in the exercise of ordinary care. He showed that, at the time of his death, the deceased was a trespasser upon the right of way of the railroad company. This court has decided that such fact is itself evidence of a want of ordinary care. "The burden is always upon the plaintiff to establish either that he himself was in

the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part": Wharton's Law of Negligence, 2d ed., sec. 424. "If, therefore, the plaintiff in his own case shows that he brought the injury on himself by his own carelessness, he may be nonsuited": Id., sec. 427.

As the violation of the city ordinance by running at too great a rate of speed is the fact relied on to show that defendant wantonly and willfully caused the death of Riordan, and as this court has decided that such fact is not evidence of willfulness, it follows that if the case had been submitted to the jury, and a verdict for the plaintiff had been returned, it would have been the duty of the trial court to set the verdict aside. This being so, it was proper for the court to instruct the jury in the first place to find for the defendant: Wharton's Law of Negligence, sec. 420.

The trial court erred in overruling the demurrer to the plea of the statute of limitations. The additional count did not introduce a new cause of action, but was a mere restatement, by way of amendment, of the cause of action set up in the original counts of the declaration. The plea of the statute of limitations to the additional count was not, therefore, a good plea. But this error worked no harm to the appellant, as all the evidence proper to be introduced under the additional count was permitted to be introduced under the other counts.

The judgment of the appellate court is affirmed.

RAILWAYS—TRESPASSERS—A TRESPASSER ON A RAILWAY TRACK, WHAT CARE ENTITLED TO: Note to *Kelly v. Michigan etc. R'y Co.*, 8 Am. St. Rep. 876; *State v. Baltimore etc. R'y Co.*, 69 Md. 494; *ante*, p. 436, and note; *Stringer v. Frost*, 116 Ind. 477; *post*, p. 875. But although persons walking upon tracks may be technically trespassers, yet if they use due care to avoid injury from the wrongful act of the company, they may recover damages for injuries thereby sustained: *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 522, and note 529.

NEGLIGENCE.—THE PLAINTIFF MUST AVER AND ESTABLISH HIS OWN LACK OF NEGLIGENCE when seeking to recover for the negligence of another: *Evanville etc. R. R. Co. v. Crist*, 116 Ind. 446; *post*, p. 865, and note.

NEGLIGENCE—BURDEN OF PROOF.—THE BURDEN OF PROOF IS UPON THE PLAINTIFF TO PROVE THE NEGLIGENCE by him alleged: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep., and note; but when plaintiff has made a *prima facie* case, the burden of proving the absence of negligence is upon the carrier, where goods are lost while in its possession: *Merchants' D. T. Co. v. Bloch Brothers*, 86 Tenn. 392; 6 Am. St. Rep. 847, and note 864. For a general discussion of the *onus* of proof in cases of negligence, see notes to *Smith v. St. Paul City R'y Co.*, 50 Am. Rep. 553-560;

Farish v. Reigle, 62 Am. Dec. 679-689; *State v. Maine Cent. R. R. Co.*, 49 Am. Rep. 628, 629.

RAILWAYS. — THE FAILURE TO RING BELL OR BLOW THE WHISTLE OF A LOCOMOTIVE AT A PRIVATE CROSSING in the open country, guarded by gates, where there is no station or side-track, and where no trains ever stop, where the custom was not to sound the whistle, and there was no whistling-post, etc., is no evidence of negligence on the part of the railway company: *Philadelphia etc. R. R. Co. v. Frank*, 67 Md. 339; 1 Am. St. Rep. 390, and note 395, as to the obligations of railways to give warnings at crossings.

HARMLESS ERRORS. — THERE WILL NOT BE A REVERSAL for harmless, immaterial errors, which work no injury to the complainant: *Merchants' D. T. Co. v. Block Brothers*, 86 Tenn. 392; 6 Am. St. Rep. 847, and note; *Stumore v. Shaw*, 68 Md. 11; 6 Am. St. Rep. 412, and note 417; *Weinstein v. National Bank of Jefferson*, 69 Tex. 38; 5 Am. St. Rep. 23; *Barnett v. Vincent*, 69 Tex. 685; 5 Am. St. Rep. 98, and note 102; *Oshkosh etc. Co. v. Germania F. Ins. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233, and note 236; *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285, and note 304; *People v. Sharp*, 2 N. Y. 427; 1 Am. St. Rep. 851; *Callanan v. Gilman*, 107 N. Y. 360; 1 Am. St. Rep. 831; *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144; *Louisville etc. R'y Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155. It is a harmless error to sustain a demurrer to a paragraph in the answer of a defendant where the facts set forth therein are admissible under another paragraph, which remains as a part of the record in the case: *Letman v. Scott*, 113 Ind. 76.

IRISH v. ANTIOCH COLLEGE.

[126 ILLINOIS, 474.]

CREATOR OF TRUST TO SECURE PAYMENT OF MONEY MAY GIVE IT ANY SHAPE he chooses; he can appoint not only a trustee, but also a successor in the trust, and he may prescribe the conditions upon which such successor may take the place of the original trustee, and execute the trust.

REFUSAL OF TRUSTEE IN TRUST DEED TO ACT, EFFECT OF. — Where a trust deed provides that upon the refusal of the trustee named therein to act, the title thereby conveyed and the power therein conferred should become vested in another person named as successor in the trust, upon such trustee's refusal to act, the legal title to the land conveyed by the deed and the power of sale created by it pass, by operation of the power of appointment already exercised by the creator of the trust, to and become vested in the successor in the trust.

TRUSTEE'S SALE IS NOT INVALIDATED BY MISRECITAL IN NOTICE OF SALE and in the deed of the circumstances which devolved the execution of the trust upon him, where the deed of trust contains no provision requiring a recital of such circumstances.

LACHES, WHEN BAR TO SUIT TO SET ASIDE TRUSTEE'S SALE FOR MERE IRREGULARITY. — In a suit to set aside a trustee's sale, made under a power in a deed of trust, for a mere irregularity which does not render the sale absolutely void, if the complainant, with full knowledge of the alleged irregularity in the sale, lies by for more than ten years, during which

time the property in question becomes largely enhanced in value, large sums are spent upon it by way of repairs and improvements, and the rights of purchasers and mortgagees intervene, his delay will constitute a bar to the relief sought by him.

OWNER OF EQUITY OF REDEMPTION MUST AVAIL HIMSELF IN APT TIME OF IRREGULARITIES in a sale under a power in a mortgage or trust deed, and his failure to do so will constitute laches. He cannot be permitted to lie by and await events, and have the power, at any time in the future, to let the sale stand or to avoid it, according as it may be found then for his interest to do. He must act promptly within a reasonable time.

BILL to redeem. In 1872, George Irish and wife executed to Albert L. Coe, as trustee, a trust deed of the lands in question, to secure the payment of a sum of money borrowed by them from Artemas Carter, treasurer of Antioch College. The deed contained a power of sale in case of non-payment. The bill was dismissed for want of equity. Other facts appear from the opinion.

B. M. Saunders and Paul Brown, for the appellants.

Mason Brothers, Pedrick and Dawson, and Jeremiah Leaming, for the appellees.

BAILEY, J. By the terms of the deed of trust, the legal title to the premises conveyed, together with the power of sale thereby granted, was vested, in the first instance, in Coe, the trustee. But it was also provided that upon the happening of either one of four events, viz.: 1. Coe's death; 2. His absence; 3. His inability to act; or 4. His refusal to act,—said title and power should become vested in Lyman, as Coe's successor in trust. The power of a person creating and declaring a trust of this character to give it any shape he may choose, and to appoint not only a trustee, but a successor in trust, and prescribe the conditions upon which such successor may take the place of the original trustee, and execute the trust, is recognized and affirmed by the decision of this court in *Equitable Trust Co. v. Fisher*, 106 Ill. 189. Whether either of the prescribed conditions happened in the present case, so as to authorize Lyman to execute the power of sale, is a question of fact to be determined from the evidence.

During all the time Lyman was attempting to execute the power of sale, Coe was in fact absent from the state, but in view of the rule established by the decision above referred to, it may be doubtful whether his absence was of such a permanent character as was contemplated by the language of the

deed of trust. But whether this be so or not, the evidence clearly establishes a refusal on the part of Coe to act as trustee. Both he and Lyman testify that when applied to by Carter, the legal holder of the bond and deed of trust, to execute the power of sale, he declined to act, placing his refusal partly upon the ground of his anticipated absence from the state, and partly upon another ground which he deemed sufficient. His refusal was absolute. When asked to perform the duties of his trust, he stated that he would not act as trustee. It was competent for him to refuse to act if he saw fit, and it was doubtless in view, among other things, of such possible refusal that provision was made for a successor in trust. Upon such refusal, the legal title to the land conveyed by the deed of trust, as well as the power of sale created by said deed, passed, by operation of the power of appointment already exercised by the creator of the trust, to and became vested in Lyman as successor in trust.

But it is urged that the sale by Lyman cannot be sustained because, in the notice of sale as well as in the trustee's deed, he based his right to act as trustee upon Coe's absence, and not upon his refusal to act. It is clear that this misrecital, if material at all, has no bearing whatever upon the question of Lyman's power to act, but only goes to the regularity of the mode in which the trust was executed. It is doubtless the rule that in the execution of trusts of this character, the forms and mode of procedure prescribed by the creator of the trust must be strictly pursued. But it should be observed that the deed of trust in this case contained no provision requiring the successor in trust to recite in his notice of sale the circumstances which devolved the execution of the trust upon him. If the notice had been entirely silent on that subject, we cannot see that it would have been defective for that reason. An incorrect recital, then, so long as it pertained to a matter wholly outside of and beyond anything required by the terms of the deed of trust, was immaterial, unless it can be seen that it was of such a character as would have some probable tendency to prejudice the interests of the owners of the equity of redemption. We are unable to perceive how the recital in question could have had such tendency, and are therefore disposed to hold that the validity of the sale was in no way impaired or affected by it.

But there is another ground upon which the complainants were properly denied the relief prayed for in their bill. The

sale took place on the twelfth day of February, 1876, and the original bill was not filed until October 13, 1886, ten years and eight months after the sale, and nine years and three months after the complainants had been put out of possession by the execution of a writ of restitution issued on a judgment against them in an action of forcible detainer. The defect in the execution of the power of sale, if it was a defect, was a mere irregularity, and not of a character to render the sale absolutely void. George Irish, the principal complainant, was present at the sale, and well advised at the time of all the facts of which he now seeks to avail himself as a ground for vacating the sale. During the interval between the sale and the filing of the bill the property in question became largely enhanced in value. Large sums of money had been expended upon it both by Antioch College and its grantees by way of repairs and improvements. The rights of purchasers and mortgagees had intervened. No excuse for the delay on the part of the complainants in asserting their rights is made or attempted, except their inability to redeem for want of means. No fraud or improper conduct on the part of the trustee, the purchaser, or the parties claiming under the purchase, is alleged, the only ground upon which the sale is attacked being the alleged irregularity above mentioned.

The rule is, that the owner of the equity of redemption should avail himself in apt time of irregularities in a sale under a power of sale in a mortgage or deed of trust, and that his failure to do so will constitute laches. It is not permissible for him to lie by and await events, and have the power, at any time in the future, to let the sale stand or to avoid it, according as it may be found then for his interest to do. There should be promptitude of action within a reasonable time: *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562; *Dempster v. West*, 69 Ill. 613; *Maher v. Farwell*, 97 Id. 56; *Bush v. Sherman*, 80 Id. 160; *Hoyt v. Pawtucket Institution for Savings*, 110 Id. 390; *McHany v. Schenk*, 88 Id. 357.

Under the circumstances of this case, the laches of the complainants in failing to file their bill to redeem in apt time is sufficient to bar their right to relief in equity. The decision of the court below is the only proper conclusion to be drawn from the pleadings and evidence, and the decree will therefore be affirmed.

TRUSTS. — TO CREATE A VALID TRUST, A DEFINITE BENEVIOLARY IS ESSENTIAL: *Holland v. Alcock*, 103 N. Y. 312; 2 Am. St. Rep. 420.

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TRUSTEES' SALES. — SALES AND TITLES FOUNDED UPON POWERS OF SALE CONTAINED IN TRUST DEEDS should not be avoided for slight cause, but where the power has not been executed in accordance with the essential conditions, the sale and deed will be held to be utterly void at law and in equity: *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281.

LACHES. — WHERE AN EXECUTRIX PAID IN 1850 THE PURCHASE-MONEY ON THE LAND PURCHASED IN 1840 BY HER TESTATOR, AND TOOK the conveyance to herself as executrix, and in 1854 conveyed the same to a trustee to secure the payment of certain bonds payable to her son, by whom said bonds were assigned to one F., and after her death F.'s administrator, in 1881, brought action to enforce the trust deed, claiming that if the land was not her property, she was at least subrogated to the vendor's lien thereon for the purchase-money which she had paid, and that this lien passed by her trust deed, F.'s rights were lost by his laches: *Morgan v. Fisher's Adm'r*, 82 Va. 417.

TYLER v. TYLER.

[126 ILLINOIS, 525.]

TRANSFER OF PROPERTY, MADE BY HUSBAND TO DELAY, HINDER, AND DEFRAUD HIS WIFE in the assertion of her claim to a separate maintenance, is within the Illinois statute of frauds and perjuries, which makes void every gift, grant, conveyance, assignment, or transfer of or charge upon any estate, real or personal, made with the intent to disturb, delay, hinder, or defraud creditors or other persons.

TRANSFER OF PROPERTY WHICH ATTEMPTS TO SECURE TO TRANSFERRER USE OF PROPERTY thereby transferred, to the exclusion of creditors or others having claims upon him, is fraudulent on its face.

PARTY OSTENSIBLY BOUND BY FRAUDULENT INSTRUMENT MAY GO BEHIND ITS LANGUAGE, and show that the real purpose of its execution was to hinder, delay, and defraud creditors, in violation of the statute of frauds and perjuries, in a suit brought against him for its enforcement.

TRUST, THOUGH EXPRESSED IN WRITING, MAY BE SECRET, and is so where the fraudulent grantee or assignee, without the knowledge of any one other than the fraudulent grantor or assignor, executes a writing declaring the trust, and hands it to the fraudulent grantor or assignor, who thereafter keeps it secretly in his own possession.

PARTIES TO FRAUDULENT CONVEYANCE OR ASSIGNMENT MAY MAKE NEW AND INDEPENDENT AGREEMENT, for a sufficient valuable consideration, whereby the grantee or assignee may be obligated to hold the property in trust for the grantor or assignor; but such agreement must be open and notorious, and made in good faith, otherwise it will be but attempting to create anew a secret trust already condemned by the statute.

STATEMENTS OF FRAUDULENT GRANTOR, MADE TO GRANTEE'S ATTORNEY, regarding the former's purpose in making the conveyances and assignments of his property, are not privileged, as against such grantor, but are admissible in evidence in favor of the grantee in a suit brought against him by the grantor for a reconveyance.

PARTIES NOT APPEALING. — Where one only of several parties appeals to the appellate court, where the case is heard, and from which an appeal is taken to the supreme court, the latter court can only consider the case as it was in the appellate court.

BILL for reconveyance and reassignment of certain property, brought by William A. Tyler against John B. Tyler. On the 27th of August, 1885, in anticipation of the commencement of proceedings by the wife of the former for separate maintenance, he made a written assignment to John B. Tyler of certain notes, bonds, mortgages, etc., amounting to about eighty thousand one hundred dollars, the assignee agreeing to pay to the assignor the sum of five thousand dollars per annum for his necessary support, the assignor to be the judge of his necessities. The consideration stated, in addition to this undertaking, was ten thousand dollars. On the afternoon of the same day, John B. Tyler, at the request of William A. Tyler, executed and delivered to him an agreement in writing, by which he agreed, whenever demand should be made by said William A. Tyler, to surrender back said personal property, with the interest due upon the securities. On the 9th of September, 1885, William A. Tyler conveyed certain lands then owned by him in the state of New York, where his wife resided, to one Sheldon. On the 11th of September, 1885, Sheldon conveyed the same to John B. Tyler for an advance of one hundred dollars on the price he paid, William A. Tyler furnishing the money paid by John B. Tyler; and at the same time the latter executed and delivered to said William A. Tyler an instrument acknowledging the receipt of the value of the lands, and agreeing to give as good a title, on demand, as he had received. On October 6th, the wife of William A. Tyler filed her bill for maintenance, and on the 29th of December, 1885, an order was made requiring him to pay her alimony and costs. In January or February, 1886, William A. Tyler executed and delivered to John B. Tyler an instrument dated back to September 30, 1885, by which he released him from the payment of the annuity of five thousand dollars per annum provided for in the assignment of August 27, 1885, in consideration of his having bed and board furnished him in the family of said John B. Tyler during his natural life. The bill alleged that the assignments were made merely for the convenience of the assignor, and to enable John B. Tyler to act as his agent, and assist him in transacting his business; that John B. Tyler agreed that the assignment should not take effect as long as William A. Tyler was able to manage his business and affairs, and that he continued able to manage his business and affairs; that upon the original agreement of John B. Tyler, that he would, upon request, reassign said prop-

erty, and to enable said John B. Tyler to aid him in collecting the interest, etc., and to enable said John B. Tyler to aid him in reinvesting the principal, the complainant permitted the securities to remain in the name of John B. Tyler, and reinvested some of the principal and interest in the name of said John B. Tyler, and that all the money for which said notes and other securities were given belonged to complainant. At the trial, an amendment to the bill was made, in which complainant alleged that in the month of March, 1886, the defendant executed and delivered to complainant a written statement, whereby he declared that all of said securities and properties belonged to the complainant, and were held by the defendant in trust for complainant. The bill prayed that the defendant be enjoined from collecting any money due or to become due upon the securities, and from selling or mortgaging the real estate, and from interfering in the management and control of said property, and that the defendant be decreed to reassign, transfer, and convey to complainant said securities and land. The answer denied the execution of the written statement set up in the amendment, and alleged that the assignments, transfers, etc., set out in the bill were made solely for the purpose of defrauding the wife of the complainant, and preventing her from obtaining maintenance and support from his property. Other facts appear from the opinion.

Roberts, Hutchinson, and Thomas, for the appellants.

Hutchinson and Luff, for the appellee.

SCHOLFIELD, J. The appellate court, in its opinion filed on reversing the decree of the superior court, concurred in the conclusion reached by the superior court, that the conveyances and assignments in controversy were conceived and executed by the present appellee, of his own motion, for the purpose of preventing his wife from obtaining maintenance and support from his property. We have carefully examined the evidence preserved in the record, and we have no doubt of the correctness of that conclusion. In our opinion, the allegations of the bill are unsupported by the evidence, and it might be sufficient to dismiss the bill for that reason, without considering any other: See *White v. Morrison*, 11 Ill. 361; *McKay v. Bissett*, 5 Gilm. 499; *Jackson v. Miner*, 101 Ill. 550; *Baldwin v. Campfield*, 9 N. J. Eq. 891. We shall, however, not rest our decision on that ground alone.

The fourth section of our statute of frauds and perjuries makes void every gift, grant, conveyance, assignment, or transfer of or charge upon any estate, real or personal, . . . made with the intent to disturb, delay, hinder, or defraud creditors or other persons," etc.: R. S. 1874, c. 59. If the wife be not technically a "creditor," she surely comes within the language "other persons," and she is obviously as much injured by such a conveyance as any creditor can be. The same or equivalent language has been held to apply to the wife in the following cases: *Boils v. Boils*, 1 Cold. 287; *Reynolds v. Vance*, 1 Heisk. 344; *Killinger v. Reidenhauer*, 6 Serg. & R. 531; *Bouslough v. Bouslough*, 68 Pa. St. 499; *Brewer v. Connell*, 11 Humph. 500; *Jenny v. Jenny*, 24 Vt. 324; *Gilson v. Hutchinson*, 120 Mass. 27; *Jiggitts v. Jiggitts*, 40 Miss. 714; *Green v. Adams*, 59 Vt. 602; 59 Am. Rep. 761; *Johnson v. Johnson*, 12 Ky. 485; see also Bump on Fraudulent Conveyances, 515.

In *Draper v. Draper*, 68 Ill. 17, we held that a conveyance, after bill filed for divorce and alimony, with intent to deprive the wife of alimony, was fraudulent, and should be set aside; and this, by necessary inference, recognizes that the wife is within the contemplation of the statute.

The instrument executed on the morning of the twenty-seventh day of August, 1885, is, upon its face, plainly fraudulent, in that it attempts to secure the use of the property to appellee to the exclusion of all others,—whether creditors or others having claims upon him: *Power v. Alston*, 93 Ill. 587; *Annis v. Bonar*, 86 Id. 128; *Truitt v. Griffin*, 61 Id. 26; *Mitchell v. Sawyer*, 115 Id. 650; *Moore v. Wood*, 100 Id. 451. And the same is in effect the character of the instrument bearing date September 30, 1885.

But assuming that the several assignments and conveyances contain nothing upon their faces to condemn them, and that in the papers subsequently executed there is a trust declared in behalf of appellee, which upon its face discloses nothing to render it illegal, the question arises, Is it competent for the defendant to show that the several assignments and conveyances were in fact made to prevent the wife of appellee from obtaining maintenance and support from his property, and that the papers declaring the trust were executed secretly, and knowledge thereof withheld from the public, to enable appellee to reassert his ownership of the property after having accomplished the purpose of the assignments and conveyances. It seems to be thought by counsel for appellee that *Fast v.*

McPherson, 98 Ill. 496, requires an answer in the negative. It is clear that such a view results from a misapprehension of the point actually in controversy in that case. It was there charged that Dexter had held the property in secret trust, in fraud of the creditors of Mrs. McPherson. But he had executed his trust by conveying the property by the direction of the agent of Mrs. McPherson to Fast, and Fast made a formal public declaration, in writing, that he held in trust. The principle applied is well sustained by authority. "Thus where an act, though the result of an unlawful contract, is itself lawful, it may form the consideration for a lawful agreement; as, for instance, the actual transfer of stock, the agreement to do which was illegal. Similarly, a trustee into whose hands money is paid on account of a third person cannot set up the illegality of the trust under which the money was so paid, though the *cestui que trust* could not have enforced his right against the payor directly, as in that case he could only have got the money through the illegal agreement": Fry on Specific Performance, 2d Am. ed., p. 215, sec. 313; see also *Id.*, sec. 312.

This court, in *Miller v. Marckle*, 21 Ill. 152, committed itself to the doctrine that it is competent to go behind the language of a writing, and show that the real purpose of its execution is to hinder, delay, and defraud creditors, in violation of the statute of frauds and perjuries,—and this in behalf of the party ostensibly bound by the instrument, and to defeat a suit for its enforcement. The doctrine is reasserted in *Ryan v. Ryan*, 97 Id. 38, and indirectly recognized in *Dunaway v. Robertson*, 95 Id. 419.

In *Nellis v. Clark*, 20 Wend. 24, and in *Smith v. Hubbs*, 10 Me. 71, cited with approval and relied upon in *Miller v. Marckle* and *Dunaway v. Robertson*, *supra*, the point was raised, and insisted on in argument, that the defense that the instrument was executed in violation of the statute of frauds and perjuries can only be allowed where the facts showing it must necessarily make a part of the plaintiff's or complainant's proof; but it was disallowed, and expressly ruled otherwise.

We concede that the ruling in some states is different from that in this court in the cases to which we have referred; but our cases are not without authority or reason, and the question must be regarded to be settled here as they declare. In addition to the cases cited in *Miller v. Marckle*, *supra*, the following may be referred to as sustaining like views: *Walton v.*

Tusten, 49 Miss. 569; *Chapin v. Pease*, 10 Conn. 69; *Murphy v. Hubert*, 16 Pa. St. 50; *Schenck v. Hart*, 32 N. J. Eq. 774; *Goudy v. Gebhart*, 1 Ohio St. 262; *McQuade v. Rosecranz*, 36 Id. 442; *Inhabitants of Canton v. Inhabitants of Dorchester*, 8 Cush. 525.

It is argued that the fact that a declaration of trust is in writing prevents its being secret. If, as we have before herein intimated, the purpose of this trust, as disclosed by the instruments relied upon as proving it, is upon its face to reserve the use of the property to appellee while placing it beyond the reach of others having a legal right apart from such transfer to resort to it, this is not important. But we do not think the question of the secrecy or the publicity of the trust is affected by the circumstance of whether it was created by word of mouth only, or by writing. That affects simply the question of proof. If the trust affects lands, it must be in writing: R. S. 1874, c. 59, sec. 9. But manifestly, a trust may be public, and yet be created by word of mouth only. Coke says in *Twyne's case*: "And therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also: 1. Let it be made in a public manner, and before the neighbors, and not in private," etc. Had he understood that a writing would have been conclusive of this question, he would undoubtedly have added after the words "in private" "or let a memorandum thereof be made in writing," etc. And it is quite as manifest that a trust, though expressed in writing, may be secret, — as if the fraudulent grantee or assignee, without the knowledge of any one other than the fraudulent grantor or assignor, execute a writing declaring the trust, and hand it to the fraudulent grantor or assignor, and he thereafter keep it secretly in his own possession. The writing may be as effectually hid from the world at large as is the memory of the fact not reduced to writing. The writings here relied upon were not placed upon record. They were retained in the pocket-book of appellee, and they were completely secreted from all but him and appellant, and so the trust they declare is a secret trust.

We are not unmindful, in this connection, that it is competent, in the case of a fraudulent conveyance or assignment, for the parties thereto to subsequently make a new and independent agreement, for a sufficient valuable consideration, whereby the grantee or assignee shall be obligated to hold the property in trust for the grantor or assignor, as held in *Parker*

v. *Tiffany*, 52 Ill. 286, and *Songer v. Partridge*, 107 Id. 529; see also Roberts on Fraudulent Conveyances, p. 495, sec. 10. But it is manifest such agreement must be open and notorious, and made in good faith, to establish a trust in the property, for otherwise it would be but attempting to create anew a secret trust already condemned by the statute.

What is here relied upon as a new agreement creating a trust between these parties is an agreement of which the public knew nothing, which the appellee kept concealed in his pocket-book, and which he was under no obligation to observe unless he chose to do so, and which he himself wholly ignored and disregarded in the instrument he executed in January or February following, and dated September 30, 1885. If the first trust was secret, this one was clearly so. Not only was knowledge of it kept from the public, but it does not appear that any right was attempted to be asserted by virtue of it. In truth, we have the impression, from a careful reading of the evidence, that the execution of these several papers was but an effort to guard against dangers suggested by new fears that appellee's wife might reach his property, as excited from time to time. Appellee seems to have been a passive instrument all the time, and when acting at all, acting only and strictly in obedience to appellant.

An objection is urged that the superior court erred in permitting Cox, an attorney at law, to testify to what appellee said to him in respect to his purpose in making the assignments, conveyances, etc., to appellant. The objection is not tenable. No matter of confidence, as between appellee and Cox, was testified to. Cox was the attorney of appellant, not of appellee; and at most, the case is not different from *Lynn v. Lyerle*, 113 Ill. 128, where it was held that if two parties go together to an attorney, and make statements to him in the presence of each other, they are not confidential communications and therefore privileged.

The contention that the court erred in not requiring the parties to interplead on the petition of Hutchinson and Luff is not tenable. Hutchinson and Luff, the parties injured, if any, by that ruling, are not before us. They neither appealed nor sued out a writ of error. We can only consider the case as it was before the appellate court.

The judgment of the appellate court is reversed, and the decree of the superior court is affirmed. Appellant will recover his costs in the appellate court as well as in this court

to be taxed on the certificate of the clerk of the appellate court.

FRAUDULENT CONVEYANCES. — WHAT ARE FRAUDULENT CONVEYANCES, AND INSTANCES OF: *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78, and note 82-84; *Harper v. Harper*, 85 Ky. 160; 7 Am. St. Rep. 583, and note 587; note to 28 Am. Rep. 721-723. Where grantor conveys property for a meager consideration under an agreement to reconvey, the deed and agreement create a secret trust in favor of the grantor, and are fraudulent as against grantor's wife in her suit for divorce and alimony, when the grantee had notice at the time of the facts constituting the ground for divorce: *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162, and note 168.

ANDREWS v. BOEDECKER.

[126 ILLINOIS, 605.]

PARTIES WHO CO-OPERATE IN DOING NEGLIGENT ACT CAUSING INJURY ARE LIABLE, either jointly or severally, for the damage thereby occasioned.

LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT. — One whose servants by his direction pile lumber, part of it without assistance, and the remainder of it with the voluntary and gratuitous assistance of a third party, in so unskillful and unsafe a manner that it falls upon and kills a person, without any negligence or want of care on the part of the latter, is liable for the injury, whether the party who assisted in piling a portion of the lumber was or was not his servant.

CASE brought by Mary Boedecker, administratrix of Henry J. Boedecker, deceased, to recover damages for the death of her intestate. Teamsters in the employ of Andrews piled lumber belonging to him, part of it without assistance, and the remainder with the voluntary and gratuitous assistance of one Honey. The lumber was piled in so negligent, careless, and unsafe a manner that it fell over upon the adjoining lot, and caused the death of the deceased. Other facts are stated in the opinion.

Lyman M. Paine, for the appellant.

George W. Stanford, for the appellee.

BAKER, J. All controverted questions of fact in the case are settled in favor of appellee by the verdict of the jury and the judgment of affirmance in the appellate court. The grounds upon which a reversal is now asked are, that the first and second instructions for appellee were erroneous, and that it was error to refuse the third instruction tendered by appellant.

In said first instruction, the court instructed the jury, in substance, that if the teamsters of appellant, by direction of appellant, hauled the lumber which slid over and upon the deceased to the premises used and occupied as and for a dry-kiln and place for piling and handling such lumber, and that such teamsters unloaded and piled a portion of such lumber without the assistance of others, and unloaded and piled the balance of such lumber with the voluntary and gratuitous assistance of the witness Honey, and if such lumber was piled by such persons in an unskillful and unsafe way and manner, and by reason of such unskillful and unsafe piling of such lumber the same fell over and upon the deceased, and killed him, without any negligence or want of ordinary care on his part, then the defendant was guilty. The instruction proceeds upon the hypothesis that the teamsters of appellant unloaded and piled a portion of the lumber without the assistance of others, and unloaded and piled the residue of it with the assistance of Honey. Upon the hypothesis stated, the acts of unloading and piling a portion of the lumber were the acts of appellant, by his teamsters and servants; and the acts of unloading and piling the other portion were the joint acts of Honey and of appellant, by his same teamsters and servants. Parties who act in concert, and co-operate in doing a negligent act which causes an injury, are liable, either jointly or severally, to the person injured, for the damage thereby occasioned. The theoretical case stated in the instruction was supported by the evidence, and it imposed a clear legal liability upon appellant, regardless of the fact whether Honey is or is not to be regarded as having been his servant, volunteer or otherwise, in the transactions involved in the suit. We see no valid objection to the instruction, and hold it was not error to give it.

The relation of master and servant existed between appellant and his teamsters, and it was within the scope of the employment of the latter not only to haul the lumber to the yard, but to deliver it there, the platform being full, by unloading and piling it upon the ground. This being so, and it being immaterial whether Honey was or was not a servant of appellant, the rulings of the trial court in refusing the third instruction asked by appellant, and giving the second instruction for appellee, and without reference to the question of the propriety of such rulings, affords no ground for reversal, as

whatever was the relation of Honey to appellant, the rule of *respondeat superior* was applicable to the case.

We find no manifest error in the case. The judgment of the appellate court is affirmed.

MASTER AND SERVANT. — THE TEST OF LIABILITY OF A MASTER FOR THE ACTS OF HIS SERVANT: Note to *Water-works Co. v. Hubbard*, 7 Am. St. Rep. 37; *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751, and note 759, 760; note to *Blake v. Ferris*, 55 Am. Dec. 317-321; notes to *Ware v. B. & L. Canal Co.*, 35 Id. 192-201; *Kansas City etc. R. R. Co. v. Kelly*, 59 Am. Rep. 601-604.

JOINT TORT-FEASORS ARE JOINTLY LIABLE FOR INJURIES WHICH RESULT FROM THEIR CONCURRENT NEGLIGENCE: *Klauder v. McGrath*, 35 Pa. St. 128; 78 Am. Dec. 329; and elaborate notes to *Creed v. Hartmann*, 86 Id. 348; *Navigation etc. Co. v. Richards*, 98 Id. 212.

FRENCH v. MILLER.

[126 ILLINOIS, 611.]

CONFESSION OF JUDGMENT UPON WARRANT OF ATTORNEY IN ACTION OF FORCIBLE ENTRY AND DETAINER is not authorized under the law of Illinois. In this action, which is a special statutory proceeding, summary in its nature, and in derogation of the common law, the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be *coram non judice* and void.

PARTIES CANNOT, BY CONTRACT, VARY PROCEDURE IN COURTS OF JUSTICE prescribed by the statute. A landlord cannot, therefore, by exacting from his tenant a power of attorney in his lease, obtain the right to an immediate judgment without having demanded possession or having process issued or served, or to an immediate writ of restitution, where the statute provides that in forcible entry and detainer a demand for possession must be made upon the tenant before the commencement of the action, a complaint in writing be filed before summons issues, service of summons be made in a manner different from the service in other actions at law, and in case of judgment, that no writ of restitution be issued in any case until the expiration of five days.

COURT OF RECORD DERIVES ITS AUTHORITY WHOLLY FROM STATUTE IN FORCIBLE DETAINER PROCEEDING, and does not proceed therein by virtue of its power as a court of general jurisdiction. In such proceeding, it is to be treated as a court of special and limited jurisdiction, and a confession of judgment upon a warrant of attorney in it is as irregular and unauthorized as it would be in a justice's court.

APPEAL from the appellate court of the first district. The appellant filed in the superior court of Cook County a verified complaint in forcible detainer, alleging that he was entitled to the possession of certain premises in said county, and that

the appellee unlawfully withheld from him the possession thereof. With the complaint was filed an affidavit stating that the appellee was unlawfully holding said premises after the expiration of a certain lease. He also filed with the complaint a lease of the premises, the execution of which was duly proved by affidavit, containing a covenant on the part of the lessee of said premises to surrender possession thereof to the lessor at the expiration of the term, and also a warrant of attorney authorizing any attorney of any court of record, for the lessee, and in his name and stead, to appear in any court of record, at any time after default or failure by the appellee in the performance of any of the covenants of the lease, to waive the issuing and service of process, and to file a *cognovit* and confession of judgment for the possession of the whole of the demised premises, and for costs of suit, in an action of forcible entry and detainer or forcible detainer, in favor of the lessor and against the lessee, and a waiver and release in writing of all errors in entering such action and judgment; and a consent in writing that a writ of restitution might be issued and executed immediately, the lessee expressly agreeing to release all errors and defects whatever in entering such action or judgment, or any proceeding therein enforcing or concerning the same. There was also filed a *cognovit*, in accordance with the terms of the warrant of attorney, confessing judgment in favor of the appellant and against the appellee, for the possession of said premises, in an action of forcible detainer, and consenting to the immediate issuing and execution of a writ of restitution, and waiving and releasing all errors that might intervene in the entry of judgment or the issuing or execution of said writ. Upon the filing of said papers in the superior court, judgment was entered in favor of the appellant and against the appellee for the possession of the premises, and for costs, and the writ of restitution was immediately issued. The appellee thereupon moved to quash the writ and to vacate said judgment, offering certain evidence in support of his motion; but said motion was overruled. The appellate court, on appeal, reversed said judgment without remanding the cause for further proceedings, and gave the appellant a certificate that the case involved questions of law of such importance, on account of principal and collateral interests, that it should be passed upon by the supreme court, and the appellant brought the record here by appeal. The

following opinion was filed by the appellate court in deciding the case:—

“MORAN, P. J. The complaint filed in the court below contained allegations sufficient to entitle appellee to the remedy sought under the forcible entry and detainer act. In this respect, this case differs from the case of *Burns v. Nash*, 23 Ill. App. 552, decided by this court. The sole question for us to determine on the record is, whether the superior court obtained jurisdiction of the person of the appellant by means of the filing of the *cognovit* in pursuance of the warrant of attorney contained in the lease.

“It is contended by counsel for appellee that a warrant of attorney to confess judgment is a familiar common-law security, and cases are cited which, it is asserted, show that it was the practice at common law to enter judgments in ejectment upon confession under a warrant of attorney, and that the practice has also obtained in Pennsylvania and been sustained by the supreme court of that state. There is some misapprehension as to the practice at common law. There were at common law, besides the judgment by default, two methods of obtaining judgment without trial,—one by a confession of judgment under a warrant of attorney, and the other upon a *cognovit actionem*, signed by the defendant in the action.

“The warrant of attorney authorized the attorney named therein to appear for the defendant and receive a declaration in an action for debt, and to confess the action or suffer judgment by *nil dicit*, or otherwise, to pass. ‘A warrant of attorney,’ says Chitty, ‘is more frequently given independently of any action, and very generally is prospective security, and although at the time it is executed, nothing is due from the party. It is in that respect a convenient collateral security to bankers and others, in consideration of their agreeing to make pecuniary advances, or to suffer a customer to overdraw his account’: 3 Chitty’s General Practice, 669.

“The *cognovit actionem* was not an authority given before the action commenced, but was a confession signed by the defendant after the process was issued. ‘When a writ has already been issued against a defendant, a *cognovit actionem*, or in other words, a written confession of the action, subscribed by the defendant, but not sealed, and authorizing the plaintiff to sign judgment and issue execution for a named

sum, is a very usual mode of saving the expenses of further proceedings in the action': 3 Chitty's General Practice, 664. Now, two at least of the cases cited by counsel to show that confession of judgment was permitted in ejectment are cases in which the judgments were entered on a *cognovit actionem*.

"In *Doe dem. Locke v. Franklin*, 7 Taunt. 9, the plaintiff obtained from the defendants in possession a *cognovit* of the action, and a *retraxit* of the plea, so that not only was there no warrant of attorney to appear and confess, but the defendants who did confess the action were already in court by service of process, and also by plea filed. *Doe dem. Rees v. Howell*, 12 Ad. & E. 696, was also a case where the defendant signed a *cognovit* confessing the action. These cases give no support to the contention that a warrant of attorney to appear and confess judgment was a recognized mode of procedure in ejectment at common law.

"*Kingston v. Kingston*, 1 Dowl., N. S., 263, appears to have been a rule *nisi* to set aside a judgment entered upon a warrant of attorney in an action of ejectment, for the reason that there was no attestation clause to the warrant of attorney in conformity with the statute then recently enacted. Patterson, J., held that the statute had no application to actions in ejectment, and in that was clearly wrong, as the same statute was held applicable to actions of ejectment in *Doe dem. Rees v. Howell*, *supra*, where the question was decided by four of the judges of the court of king's bench. The point as to the right to enter the judgment under a warrant of attorney was not raised in the case, but the implication that it was a recognized practice which might be drawn from the fact that the point was not made is negatived in the subsequent case of *Beaumont v. Beaumont*, 2 Dowl., N. S., 972, where, in moving for leave to enter a judgment on a warrant of attorney authorizing the landlord to sign judgment in ejectment upon the determination of the tenancy by notice to quit, counsel admitted that no case of a similar description was to be found in the books, but contended that there could be no objection to such a warrant of attorney. Coleridge, J., said: 'If a party enters into such an agreement, I see no reason why it should not be enforced,' but for lack of a sufficient affidavit, no judgment was entered in the case, and therefore it is no precedent, but it shows that as late as 1843 no such practice had obtained in England. The fact that no reference to such a method of proceeding in ejectment is found in works on common-law

practice (so far as we have been able to examine) goes to show pretty conclusively that such a practice was unknown to the courts and to the profession.

"It appears from the cases in Pennsylvania that there is known in that state a practice of entering what are termed 'amicable actions,' and that such actions and judgments by confession in them may be entered by the court on agreement by the parties: *McCalmont v. City of Philadelphia*, 13 Serg. & R. 190; *Cook v. Gilbert*, 8 Id. 567. In *Flanagan v. City of Philadelphia*, 51 Pa. St. 491, the lease provided that it might be terminated on the violation of any covenant, by a notice of five days, and that on such termination, any attorney might sign an agreement for entering an amicable action in ejectment against the lessee. Such an action was entered, and judgment confessed, and on motion to set it aside on the ground that it was not entered in compliance with a rule of court governing the entry of judgments on warrants of attorney, the court said: 'It nowhere appears in this record that the confession by the attorney of the defendant was in pursuance of a warrant of attorney. The amicable action and confession of judgment is according to ancient and established practice existing before the act of 1806, as well as since.'

"The practice seems to be peculiar to the state of Pennsylvania; at least our attention has not been called to a similar practice elsewhere. We do not think it can be regarded as establishing the proposition that the practice of confessing judgment upon warrant of attorney and without process having been issued obtained at common law in actions of ejectment. In *Secrist v. Zimmerman*, 55 Pa. St. 446, cited by counsel, there was no warrant of attorney, and no question of a confession on a warrant of attorney made or decided in the case. The action of ejectment was brought against the defendant for the land, and a year after its commencement the defendant confessed judgment to the plaintiff for the land in dispute and costs. The court held the judgment conclusive as to the parties and their privies, on the ground that the most important interests, not only of property and liberty, but of life itself, are habitually concluded, judicially, by solemn confession made by the party in interest in the face of a court of justice. The confession of which the court is speaking in that case was made in open court, in the face of the court after service of process, and it has never been doubted that such a confession

would authorize the judgment, and probably no one would say that such a confession would not be good in a forcible detainer case.

"An examination of all the cases counsel have been able to find seems to us to confirm what was said by this court in *Burns v. Nash, supra*, that 'the practice of entering judgment by confession upon warrant of attorney, without process, in actions of tort, did not obtain, and there is no precedent for it at common law.'

"The practice of entering judgments in debt on warrants of attorney is very old,—so old that the date of its origin is unknown. Chitty says: 'How or when this peculiar security for a debt authorizing a creditor, as it were *per saltum*, to sign a judgment and issue execution, without even issuing a writ, was first invented, does not appear, but it has now become one of the most usual collateral securities on loans of money or contracts to pay an annuity and for debts, but usually accompanied with some other deed or security': 2 Chitty's General Practice, 334.

"It was early found that unconscionable advantage was taken of debtors by creditors by means of such warrants of attorney, obtained when the debt was incurred, and when the debtor was hopeful, and executed with harshness against him in the hour of his distress, and the courts were compelled to prescribe rules, and Parliament to enact statutes, to limit the operation of such warrants, and restrain the injustice to which the use of them frequently gave rise.

"But if it were established that confessions of judgments upon warrants of attorney obtained as a practice at common law in an action of ejectment, or in other actions in form of tort, it would not authorize the practice in an action of forcible entry and detainer under the law of this state. This action is a special statutory proceeding, summary in its nature, and in derogation of the common law, and it is a rule of universal application in such actions, that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be *coram non judice* and void: *Davis v. Davis*, 115 Pa. St. 261; *Burns v. Nash, supra*, and cases there cited.

"While forcible entry and detainer is a civil proceeding for restitution, it is based upon and has by modern legislation been evolved from the English forcible entry and detainer, which was a criminal proceeding merely. Ejectment, from

its slow progress, was an inadequate remedy to a landlord, and the legislature provided the summary remedy by which a speedy recovery of possession may be secured; but to prevent hasty action and to secure tenants and their families from the danger and inconvenience of being forcibly ejected without notice and reasonable time for preparation, certain safeguards were provided by the statute. A demand for possession is required to be made upon the tenant before the commencement of the action, a complaint in writing must be filed before summons issues, service of the summons is to be made in a manner different from the service in other actions at law, and if judgment is rendered against the tenant, the statute provides that 'no writ of restitution shall be issued in any case until the expiration of five days.'

"There is in the statute a policy discoverable, as was said by Mr. Justice McAllister in *Burns v. Nash, supra*, 'based upon humane considerations of oppression and hardships which might ensue, if families, in any kind of weather, and at any time of day or night, be forcibly ejected from their homes with all their effects, without notice or warning,' which forbids the conclusion that a landlord, by exacting from his tenant a power of attorney in his lease, can obtain the right to an immediate judgment without having demanded possession or having process issued or served, and to an immediate writ of restitution, and to avail himself of the remedy against his tenant furnished by a statute every provision of which with reference to procedure he has set aside by contract, and thus to proceed to the ejection of the occupants and the recovery of possession 'by leaps,' as the creditor was enabled by a similar warrant to sign judgment and issue execution against his debtor at common law, without affording an opportunity to the tenant of raising any objection or making any defense. What wrong might be perpetrated were such a practice to be established is illustrated by the operation of the 'amicable ejectment' proceeding in Pennsylvania, as shown in *Grossman's Appeal*, 102 Pa. St. 137, where after the death of the lessee, and the acceptance of a month's rent in advance from the widow, and before the expiration of the month, the landlord, on an unfounded rumor that the widow had assigned the lease, and thus broken the covenant against assignment, confessed a judgment against the dead man under the terms of the lease, and without previous notice of the judgment or exe-

cution, the widow and heirs were dispossessed 'at the early hour of eight o'clock in the morning in February.'

"Whatever may be thought of the public policy of such a practice, it cannot be ingrafted upon our forcible detainer proceeding without the consent of the legislature. The act provides a new remedy, and the course of procedure to obtain it, and no remedy or mode of procedure can be pursued, except that directed by the act. 'If the act has prescribed the remedy for the party aggrieved, and the mode of prosecution, all other remedies and modes are excluded': *Millar v. Taylor*, 4 Burr. 23, 24; *Smith v. Lockwood*, 13 Barb. 217.

"Parties cannot by their contracts vary the procedure in courts of justice prescribed by the statute. This was expressly decided by the supreme court of Iowa in a case which we consider in point, and decisive of the question under consideration. A judgment was entered up in the district court under a warrant of attorney in a judgment note made in Pennsylvania which authorized any attorney in any court of record within the United States to confess judgment against the maker of the note. A petition was filed by the maker of the note to have the judgment declared void, and the court so ordered. On appeal, the supreme court said: 'It is claimed by appellant that the principles of the common law authorizing a warrant of attorney to confess judgment are in force in this state, and that the provisions of our code respecting the recovery of judgment by action are merely cumulative. We do not think this position is correct. The whole subject of recovery and rendition of judgment is fully reviewed in the code, and the course to be pursued in obtaining judgment is specifically pointed out. . . . A confession of judgment pertains to the remedy. A party seeking to enforce here a contract made in another state must do so in accordance with the laws of the state. Parties cannot by contract made in another state ingraft upon our procedure here remedies which our laws do not contemplate nor authorize': *Hamilton v. Schoenberger*, 47 Iowa, 385.

"*A fortiori*, parties within the state cannot, by contract, ingraft upon the procedure prescribed for a summary proceeding a remedy or practice not warranted by the statute. While parties, by consent, may waive rights, they cannot thus amend the law. A fundamental requisite to the validity of a judgment is, that the court should have jurisdiction of the subject-matter and of the parties. A judgment against a defendant who has not been served at all with process, and who has not

appeared, is a nullity. The record shows no process to the defendant, and no appearance by him, but shows a departure from the course specifically pointed out by the statute, and an attempt to give jurisdiction of the defendant, and enter judgment against him in a manner which the statute does not contemplate nor authorize. A confession of judgment upon a warrant of attorney in an action of forcible detainer in a court of record is as irregular and unauthorized as it would be in a justice's court. Such court of record does not proceed in forcible detainer by virtue of its power as a court of general jurisdiction, but derives its authority wholly from the statute, and in such proceeding is, therefore, to be treated as a court of special and limited jurisdiction: Cowen and Hill's notes to Phillips on Evidence, 946; *Burns v. Nash, supra*. A court of special and limited jurisdiction, like a justice's court, has no authority to enter a judgment by confession on a warrant of attorney, even in a case where such judgment would be authorized in a court of record by the common law: *Alberty v. Dawson*, 1 Binn. 105.

"From no point of view are we able to sustain the authority of the court to enter the judgment appealed from. We have carefully examined the question, and re-examined the views expressed in the opinion of Mr. Justice McAllister in *Burns v. Nash, supra*, and such re-examination has tended to confirm us in the position there announced. The court had no power to enter the judgment in this form of proceeding on the warrant of attorney contained in the lease, and the judgment is, therefore, *coram non judice* and void, and must be reversed."

Williams and Thompson, for the appellant.

Moses and Newman, for the appellee.

The COURT. We are satisfied with and adopt the foregoing opinion of the appellate court. Counsel for the appellant have furnished us with a brief criticising both the conclusions and reasoning of the opinion with great earnestness, and we have carefully examined the various propositions discussed and authorities cited, in the light of the suggestions thus made by counsel, and after having fully considered the case, we are disposed to concur with the appellate court both in its conclusions and in the process of reasoning by which those conclusions are reached.

The judgment of the appellate court will therefore be affirmed.

CRAIG, C. J., delivered a dissenting opinion, in which Wilkin and Magruder, JJ., concurred. He said forcible detainer is a mere civil proceeding, and not an action of tort: *Robinson v. Crummer*, 5 Gilm. 222. If it be true that a judgment could not, at common law, be confessed under a *cognovit* in forcible detainer, upon the ground that the action was one of tort, that fact does not establish the doctrine that a judgment cannot be entered under a *cognovit* in forcible detainer as that action is known and recognized under the Illinois statute. A *cognovit* to confess a judgment on a note, bond, or contract for a debt may be given, and a judgment rendered under such a *cognovit* has always been regarded as valid and binding. If binding and obligatory on a contract to pay money, why not on a contract to surrender possession of a lot or tract of land? The judgment grows out of a breach of contract in this case as in the other. In *Fabri v. Bryan*, 80 Ill. 182, it was held that where a lease contains a license to the landlord to enter into possession of the leased premises without process of law and expel and remove the tenant, and use such force as may be necessary in doing so, the landlord may enter and remove the tenant after the expiration of the term, and the tenant cannot maintain an action of trespass against him. If, as held in that case, the tenant can lawfully make such a contract under which the landlord may enter and remove him, what principle of law forbids the tenant from incorporating in a lease a provision under which, upon default of surrendering the possession at the end of the term, a judgment for possession may be confessed in a court of competent jurisdiction?

FORCIBLE ENTRY AND DETAINER. — COMMON LAW AFFORDS NO CIVIL REMEDY AGAINST ONE WHO, HAVING THE RIGHT, ENTERS FORCIBLY another's premises; but the injured party must resort to the statutory action of forcible entry and detainer: *Fuhr v. Deas*, 26 Mo. 116; 69 Am. Dec. 484.

WHETHER PARTIES MAY, BY THEIR CONTRACTS OR STIPULATIONS, MAKE A RULE OF EVIDENCE BY WHICH THE COURTS must be bound in litigation subsequently arising under such contract, see extended note to *Utter v. Traveler's Ins. Co.*, 8 Am. St. Rep. 921-924.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

OLD COLONY RAILROAD COMPANY v. TRIPP.

[147 MASSACHUSETTS, 85.]

A RAILWAY COMPANY MAY GRANT TO ONE PERSON THE EXCLUSIVE RIGHT OF COMING UPON ITS GROUNDS TO SOLICIT THE PATRONAGE OF INCOMING PASSENGERS, with respect to carrying their baggage or merchandise, and may exclude all other persons from the exercise of such right, notwithstanding a provision of the general statutes that "every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise or other property, upon its railroad, and for the use of its depot and other buildings and grounds." The statute applies only to relations between railroads as common carriers and their patrons.

ACTION of tort. The wrong complained of consisted in resorting to the grounds of the plaintiff and obstructing them, for the purpose of soliciting patronage from incoming passengers on the plaintiff's road. The defendant was the proprietor of a job-wagon, and for several years he and others had been in the habit of soliciting passengers on the plaintiff's grounds, to ascertain whether they had any merchandise or baggage which they wished carried. In August, 1886, the plaintiff, by contract, granted to Porter and Sons the right to solicit such patronage, and notified the defendant and others not to come upon their ground to solicit patronage. The right of the defendant to come on the grounds to deliver baggage or merchandise, or to take it away when previously employed by any person to do so, was not questioned; but the plaintiff contended that he had no right to come there to

solicit patronage. The trial judge ordered a verdict for the plaintiff, and reported the case for the decision of the appellate court.

J. H. Benton, Jr., and C. W. Sumner, for the plaintiff.

J. M. Day and H. Kingman, for the defendant.

W. ALLEN, J. Whatever implied license the defendant may have had to enter the plaintiff's close had been revoked by the regulations made by the plaintiff for the management of its business and the use of its property in its business. The defendant entered under a claim of right, and can justify his entry only by showing a right superior to that of the plaintiff. The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. As concerns the case at bar, the plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provided its depot for the use of persons who were transported on its cars to or from the station, and holds it for that use, and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations, but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them: See Pub. Stats., c. 112, sec. 188; *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Spofford v. Boston etc. R. R. Co.*, 128 Mass. 326. The station was a passenger station. Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it.

The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff, or to receive from it. His

purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station where his transit ends. What conveniences shall be furnished to passengers within the station for that purpose is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger which will give him relations with the plaintiff involving the right to use the depot does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job-wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all, and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such.

The only case we have seen which seems to lend any countenance to the position that a railroad company has no right to exclude persons from occupying its depots for the purpose of soliciting the patronage of passengers is *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, in which it was held that an inn-holder had no right to exclude from his inn a stage-driver who entered it to solicit guests to patronize his stage, in opposition to a driver of a rival line, who had been admitted for a like purpose. It was said to rest upon the right of the passengers, rather than that of the driver. However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of or right in the premises as will give to carriers of baggage soliciting their patronage an implied license to enter, irrevocable by the railroad company. *Barney v. Oyster Bay etc. Steamboat Co.*, 67 N. Y. 301, and *Jencks v. Coleman*, 2 Sum. 221, are cases directly in point. See also *Commonwealth v. Power*, 7 Met. 596; 41 Am. Dec. 465; and *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 837.

It is argued that the statute gave to the defendant the same right to enter upon and use the buildings and platforms of the

plaintiff which the plaintiff gave to Porter and Sons. The plaintiff made a contract with Porter and Sons to do all the service required by incoming passengers in receiving from the plaintiff and delivering in the town baggage and merchandise brought by them, and prohibited the defendant and all other owners of job-wagons from entering the station for the purpose of soliciting from passengers the carriage of their baggage and merchandise, but allowed them to enter for the purpose of delivering baggage or merchandise, or of receiving any for which they had orders. Section 188 of the Public Statutes, chapter 112, is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds; and at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." A penalty is prescribed in section 191 for violations of the statute.

The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depots, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads as common carriers and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depots for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job-wagon, is a common carrier gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them.

The English railway and canal traffic act (17 & 18 Vict., c. 81) requires every railway and canal company to afford all

reasonable facilities for traffic, and provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." *Marriott v. London etc. R'y Co.*, 1 Com. B., N. S., 499, was under this statute. The complaint was, that the omnibus of Marriott, in which he brought passengers to the railroad, was excluded by the railway company from its station grounds, when other omnibuses which brought passengers were admitted. An injunction was ordered. *Beadell v. Eastern Counties R'y Co.*, 2 Id. 509, was a complaint, under the statute, that the railway company refused to allow the complainant to ply for passengers at its station, it having granted the exclusive right of taking up passengers within the station to one Clark. The respondent allowed the complainant's cabs to enter the station for the purpose of putting down passengers, and then required him to leave the yard. An injunction was refused. One ground on which the case was distinguished from Marriott's was, that the complainant was allowed to enter the yard to set down passengers, and was only prohibited from remaining to ply for passengers: See also *Painter v. London etc. R'y Co.*, 2 Id. 702; *Barker v. Midland R'y Co.*, 18 Com. B. 46. Besides Marriott's case, *supra*, *In re Palmer and London etc. R'y Co.*, L. R. 6 Com. P. 194, and *Parkinson v. Great Western R'y*, Id. 554, are cases in which injunctions were granted under the statute: in the former case, for refusing to admit vans containing goods to the station-yard for delivery to the railway company for transportation by it; in the latter case, for refusing to deliver at the station, to a carrier authorized to receive them, goods which had been transported on the railroad.

We have not been referred to any decision or *dictum* in England or in this country that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers, or that a regulation of the company which allows such use by particular persons and denies it to others violates any right of the latter. Cases at common law or under statutes to determine whether railroad companies in particular instances gave equal terms and facilities to different parties to whom they furnished transportation and with whom they dealt as common carriers, have

no bearing on the case at bar. The defendant, in his business of solicitor of the patronage of passengers, held no relations with the plaintiff as a common carrier, and had no right to use its station grounds and buildings. A majority of the court are of the opinion that there should be judgment on the verdict.

FIELD, J., wrote a dissenting opinion, which met the concurrence of the chief justice and Justice Devens. They contended that the grant in the statute of "reasonable and equal terms, facilities, and accommodations" was not accompanied with any declaration that the persons to whom the privileges were assured should be the owners of the things to be transported, nor was the grant limited to the delivery of merchandise to be transported by the corporation. The general right of a railway corporation to exclude from its depot and grounds all persons having no business with it was not denied; but the right to admit one common carrier and at the same time to exclude others was resisted, because "the effect of such a regulation would be to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public."

A RAILWAY COMPANY HAS THE RIGHT TO EJECT forcibly from its premises a hotel-runner who comes there to solicit patronage for his hotel in violation of a regulation of the company of which he has knowledge: *Landrigan v. State*, 31 Ark. 50; 25 Am. Rep. 547; and may exclude competing vehicles from the habitual and continuous use of its track: *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 267; 36 Am. Rep. 542.

McCANN v. RANDALL.

[147 MASSACHUSETTS, 81.]

STATUTE OF LIMITATIONS OF MASSACHUSETTS DOES NOT RUN IN FAVOR OF ONE WHO HAS NEVER BEEN A RESIDENT of the state, when the plaintiff is also a non-resident against whom no statute of limitations has run in the state where he resides and where the cause of action accrued, although the statute of limitations of a third state, to which the defendant has removed, protects him from suit there.

ATTACHMENT OF PROPERTY MAY BE EFFECTUAL IN A STATE WHEREIN PERSONAL SERVICE OF PROCESS ON THE DEFENDANT CANNOT BE HAD.

ATTACHMENT, WHAT SUBJECT TO. — A DRAFT ISSUED BY THE AUTHORITY OF THE UNITED STATES, and payable at its sub-treasury, may be reached by a bill in equity, authorized by the statutes of Massachusetts, although the payee cannot be personally served with process within the state, i. the draft is in the possession of a person in the state on whom process is served.

DRAFT PAYABLE TO ORDER MAY BE ATTACHED IN EQUITY, in the hands of a third person who has a lien thereon, though it has not been indorsed, and the court has no means to compel its indorsement. The court is, by statute, vested with power to devise means to reach and apply the prop-

erty, and in any order it may make, it will recognize and protect the lien of the holder of the draft.

GOVERNMENT OF THE UNITED STATES, AS A PARTY TO A DRAFT OR CONTRACT, is like a private party, except so far as it regulates by law its liability. As a party to negotiable paper, the responsibility which it assumes is the same as that assumed by a private person.

ONE IN WHOSE HANDS A DRAFT ON A SUB-TREASURY OF THE UNITED STATES IS ATTACHED becomes answerable to the plaintiff for the amount thereof, if he permits or procures it to be thereafter indorsed and paid in contempt of the authority of the court under whose process it was attached in his hands.

BILL in equity to reach a draft on the treasury of the United States, payable to the order of the defendant Randall, and in the custody of the defendant Manning. Randall being a resident of the state of New York, service on him was made by publication. He appeared specially, and demurred to the bill for want of jurisdiction. The demurrer was overruled. On February 4, 1885, an injunction issued, and was served on Manning, while the draft was in his possession, though not indorsed by Randall. This injunction forbade Manning from delivering the draft. He disobeyed it; had the draft indorsed by Randall, presented for payment, and paid.

E. P. Payson and W. E. Spear, for the plaintiff.

C. Cowley, for the defendants.

DEVENS, J. The defendant Randall is not entitled to a defense by virtue of our statute of limitations against the promissory note now held by the plaintiff, upon the ground that the bill was not brought within six years from the time the cause of action accrued. He is not, and never has been, an inhabitant of this state, and our statute never began to run in his favor. No personal service has been made upon him, but a suit against him, with an effectual attachment of his property in this state, or of his goods, effects, or credits here situate in the hands of others, by trustee process, or proceeding similar to that in the case at bar, would be binding upon him to the extent to which property was attached or sequestered, sufficient notice having been given to him by publication or otherwise of its pendency: *Putnam v. Dike*, 13 Gray, 535.

It is the contention of the defendant Randall (who has appeared specially) that the plaintiff is within the disability imposed by the statute of 1880, chapter 98 (Pub. Stats., c. 197, sec. 11), which provides that "no action shall be brought by any person whose cause of action has been barred

by the laws of any state, territory, or country, while he has resided therein." He urges that the note in suit is now outlawed as against the plaintiff by the statutes of Maine (in which state the plaintiff resided when the note was given, and where he has ever since resided), unless the defendant Randall should return within the limits of that state, and that there is and can be no presumption that he will so return. It is found as a fact that Randall made the note in suit on January 18, 1869, he being then a resident of the state of Maine; that on November 1, 1874, he removed his residence and domicile to the state of New York, where he has resided continuously, and that since that time he has never been in the state of Maine. It is further found that, by the laws of Maine, suits upon promissory notes must be brought within six years after the cause of action accrued, and suits brought after the expiration of said six years are barred, except that "if a person is absent from and resides out of the state after a cause of action has accrued against him, the time of his absence shall not be taken as a part of the time limited for the commencement of the action": R. S. Me., 1883, c. 81, sec. 103. Upon this evidence, the presiding judge was justified in finding as a fact that the plaintiff's claim was not barred by the statutes of Maine.

By the departure of the defendant Randall from Maine, and his residence elsewhere, the statute of limitations ceased to run in his favor and against the plaintiff. This has prevented the outlawry of the note, and so far as the statutes of Maine are before us, we cannot see why an action might not now be maintained by the plaintiff against Randall in that state, if he could find property there to attach, and thus enable the court to obtain jurisdiction in the absence of Randall personally. When this bill was brought, any action by the plaintiff in the courts of New York was there barred, as the statute of limitations of that state is found to exist, Randall having resided there more than six years. But as the plaintiff never resided in New York, his action against Randall is not barred by the law of any state or country while the plaintiff has resided therein, which is the condition provided by our own statute that would prevent his maintaining an action in this commonwealth.

It is contended that the draft mentioned in the plaintiff's bill is not of the property, or goods, effects, or credits, or of any right, title, or interest, of the defendant Randall, and that

neither it nor its proceeds can be reached by this proceeding in the nature of an equitable trustee process, or otherwise. We proceed to consider this question without regard to the character of the draft, which was one issued by the authority of the United States, and payable to the order of Randall at the sub-treasury of the United States in Boston. The draft was itself in the actual custody of the defendant Manning, who was entitled to a lien upon the same and its proceeds, for certain services and disbursements. This lien was for a smaller amount than the draft, and Randall was entitled to the overplus.

It will be unnecessary to consider what would be the powers of the superior court under the general equity jurisdiction conferred upon it by the statute of 1883, chapter 223, as the case at bar comes within the express provisions of the Public Statutes, chapter 151, section 2, clause 11, which permit "bills by creditors to reach and apply, in payment of a debt, any property, right, title, or interest, legal or equitable, of a debtor within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor." This clause was amended by the statute of 1884, chapter 225, the purpose of the amendment being to extend its construction to certain cases to which it had been held that it did not apply; and its intention, when taken in connection with the Public Statutes, chapter 151, section 2, is seen to be to make "any property of a debtor" applicable to the payments of his debts, whether he is personally within the jurisdiction or not. That the right or property of Randall in the treasury draft could not be come at to be attached or taken on execution will be conceded, and the property, title, or interest of Randall therein is of the same character as that which has been repeatedly held to make the actual holder in whose custody such securities are found liable to this process as the equitable trustee of the party sued.

While notes, drafts, etc., are often said to be evidences of debt rather than the debts themselves, they represent the debts, and the right to collect such debts is by means of them transferred from one to another. Under the clause of the statute of frauds relating to contracts for the sale of goods, wares, and merchandise, it has been held that contracts for the sale of notes were included: *Baldwin v. Williams*, 3 Met. 365, 367. Such securities are themselves the subjects of common sale and barter, have a market value, are intended to be trans-

ferable, and when transferred, to convey the debts secured in a visible and tangible form: *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459. The cases in which it has been decided that the possessor of promissory notes, signed by third persons, in which a debtor against whom suit had been brought had a valuable interest, might be held by the equitable trustee process to apply them, when collected, to the payment of the creditor's debt, are quite numerous: *Davis v. Werden*, 13 Gray, 305; *Moody v. Gay*, 15 Id. 457; *Crompton v. Anthony*, 13 Allen, 33; *Barry v. Abbot*, 100 Mass. 896. "The plaintiff," says Mr. Justice Bigelow in *Davis v. Werden*, *supra*, in speaking of the statute of 1851, chapter 206, on which the clause we are considering is founded, "has a claim against one of the defendants, who resides out of the commonwealth, and who is the owner of choses in action which are in the hands of an agent residing here. This is the exact case provided for in the statute." If the possessor of the notes has himself had a just claim or lien upon them, or the proceeds to be derived from them, on the most obvious principles of justice this claim or lien has been provided for in any decree that has been made as to the application of them: *Silloway v. Columbia Ins. Co.*, 8 Gray, 199; *Barry v. Abbot*, *supra*. Nor can it be important that the party liable on the note is not a resident of this state, or served with process. While the remedy of the creditor may be less convenient or perhaps less effectual on this account, he should not therefore lose the benefit he is entitled to by reason of the possession in a third person's hands, in this state, of a valuable security in which his debtor has a property or interest, even if such security must be realized or suit brought upon it without the state.

The defendants contend that as no personal service was made upon Randall, and as he is not before the court except as he has specially appeared to object to the jurisdiction, there can be no assignment or transfer of any right or property which he may have in the draft. The draft, although negotiable in form, had not been indorsed by him, but delivery of it to Manning, or the possession of it by him with Randall's consent, operated as an equitable assignment of it. It is true that no order could have been passed which would compel Randall personally to indorse it, but means are, by necessary implication from the statute, to be found by which the creditor should obtain the benefit of it; whether by an order appropriating it to the benefit of the creditor by sequestration to his use, by a

sale on execution, by a sale with a transfer thereof by an order made by authority of this court, or by a trustee specially ordered to transfer it, or perhaps by an order that the property shall be held until the debtor shall himself (even if not personally within the jurisdiction of the court) consent to apply it to the payment of his creditor, we need not now determine. The property sought to be reached and applied is to be so appropriated by "means," to use the phrase of the statute, "within the ordinary procedure of the court." In any order relating to such application, proper provision would be made for the just claim which the defendant Manning had upon it: *Grew v. Breed*, 12 Met. 363, 370; 46 Am. Dec. 687; *Robinson v. Robinson*, 9 Gray, 447, 450; 69 Am. Dec. 301; *Norton v. Piscataqua Ins. Co.*, 111 Mass. 532, 535; *Walsh v. Walsh*, 116 Id. 377, 382; 17 Am. Rep. 162; *Felch v. Hooper*, 119 Mass. 52; *Perry on Trusts*, 820 a; *Daniel on Negotiable Instruments*, sec. 741.

It is further urged, that as the draft in question was one drawn by the treasurer of the United States upon the sub-treasury in Boston, and was what is known as a treasury draft, there could be no appropriation of it, by any legal proceeding, to the benefit of the creditor. The proposition mainly relied on is, that as the government of the United States could not be sued as the sovereign power, and that as the assistant treasurer, upon whom the draft was drawn at Boston, had he seen fit to refuse to recognize the judicial transfer of the draft, in whatever form made, could not have been compelled by any order of this court to pay the money due thereon, there could be no transfer of it, or of Randall's right therein. The government of the United States, as a party to a contract, agreement, trust, bond, or instrument, as a note, draft, or order, is like a private party, except so far as it regulates by law its liability. It may make, and has made, many contracts with it unassignable, sometimes partially, sometimes entirely so, as its own convenience seemed to dictate, in the administration of public affairs, although even in these cases transfers by operation of law, by assignment to creditors, by will, or by descent, have usually been recognized as constituting sufficient assignment of the claim or contract: *Milnor v. Metz*, 16 Pet. 221, 222; *Erwin v. United States*, 97 U. S. 392; *Goodman v. Niblack*, 102 Id. 556.

When the United States becomes a party to negotiable paper, whether note, bill of exchange, or draft, the responsi-

bility which it assumes is the same as that assumed by any private person. It cannot, indeed, be sued except as it consents to be, and it may not be possible to reach and control its officers by the same processes that may be applied to private individuals. It was held in the celebrated case of *The Floyd Acceptances*, 7 Wall. 666, that the government of the United States had the right to use bills of exchange for the purpose of conducting its operations, as an appropriate means, and that it was bound by the same principles that govern individuals in their relations to such paper. The only important question was, whether Mr. Floyd, the Secretary of War, had authority as the agent of the United States, by virtue of his office, to accept the bills drawn upon him. In *Bank of Republic v. Millard*, 10 Wall. 152, where the question was whether the holder of a bank check could sue the bank under the circumstances stated, the court remark: "It is hardly necessary to say that the check in question having been drawn on a public depository, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents." This is but a restatement of what had been often previously decided: *United States v. Bank of Metropolis*, 15 Pet. 377, 392; *Walker v. Smith*, 21 How. 579; *Pennsylvania v. Wheeling Bridge*, 13 Id. 518, 560; *Pierce v. United States*, 7 Ct. of Cl. 65, 68.

A suit to compel the assignment of a bond or other security of a state in no way affects the sovereignty of such state: *Pingree v. Coffin*, 12 Gray, 288, 321. That the draft in the case at bar was drawn by authority of law, and in the usual course of business, cannot be disputed. It operated as a payment of Randall's claim, and constituted a new contract with the government, in which any previous claim was merged. It was valid and binding on the United States in the hands of any *bona fide* holder thereof by indorsement for a valuable consideration, whether suit could have been brought upon it or not, as commercial bills of exchange and promissory notes are between individuals, whatever objections there may have been to the original settlements or claims on which they were issued: *McKnight v. United States*, 13 Ct. of Cl. 292, 305; R. S. U. S., sec. 308; *McKnight v. United States*, 98 U. S. 179.

The claim originally held by the defendant Randall was

not, properly speaking, a debt due from the United States, but arose from the fact that the United States held certain funds received from Great Britain, under a treaty with that power, which were to be distributed, through appropriate channels, to those who had suffered from depredations upon our commerce during the late civil war. This in no way affected the character of the draft, which was given in pursuance of an adjudication in favor of Randall by the court of commissioners of Alabama claims. Even before merger in the draft, the equitable interest in such a claim would have passed to an assignee in bankruptcy: *Leonard v. Nye*, 125 Mass. 455. It cannot be assumed that the assistant treasurer of the United States would have disregarded any transfer of the draft by operation of law, or in the course of judicial proceedings conducted by a court having jurisdiction over the person of the actual holder thereof, who was in possession of it by virtue of his relation to or authority from Randall, to whose order it was payable. Nor, had payment thereof been refused, would the transferee have been remediless. The court of claims of the United States would have been open to him, and it has the right, under the statutes which give it jurisdiction for the purpose, to hear and determine all claims "founded upon any contract, express or implied, with the government of the United States": *Milford v. Commonwealth*, 144 Mass. 64, and cases cited.

It has been found that the debt was actually due from Randall to the plaintiff, and after service of process in this case upon Manning, and after service of an injunction upon him, forbidding its transfer to Randall, the draft being at that time in Boston, the amount claimed by Manning as due upon his alleged lien was settled by mutual agreement, and the draft was sent to Randall in New York, and was there indorsed by him. Payment of it was made at the sub-treasury in Boston thereafter, and the amount received by Randall, or his agents, was the sum of \$1,852.21, which was the amount due over and above \$793.81, which had been settled as the amount of Manning's lien, and which Manning then or previously received. As the rights of the parties were fixed at the time of the notice of the *lis mota*, no temporary injunction was perhaps necessary forbidding any transfer of property until the final decree: *Maxwell v. Cochran*, 136 Mass. 73, 74. But it is found that the indorsement and payment of the draft were procured by Manning in willful disobedience of the order of the superior

court, and in contempt of its lawful authority. Under these circumstances he has incurred a liability commensurate with the value of the property which he has thus succeeded in withdrawing from the control of the court, and prevented from being applied to the lawful claims of Randall's creditors. Proceedings for contempt may be either for the purpose of inflicting punishment upon one who has willfully disobeyed a lawful order of the court, or for the purpose of obtaining the result which might have been reached by the enforcement of its decree but for the intervention of the wrongful act of the party violating its order, or in appropriate cases for both purposes: *Cartwright's Case*, 114 Mass. 230; *Maxwell v. Cochran*, *supra*; *Stimpson v. Putnam*, 41 Vt. 238; *Thweatt v. Gammell*, 56 Ga. 98; *Matthews v. Spangenberg*, 15 Fed. Rep. 813.

With the suit brought by the plaintiff was also heard one brought by one Willard, under precisely similar circumstances, which for that reason does not require any separate consideration, as there was no dispute between the plaintiff and Willard as to the proportions in which they were to receive the fund if it was appropriated to them.

We are of opinion that the presiding judge in the superior court rightfully held that Manning was bound to make up and pay to the plaintiff, and others standing in like relation, the balance of the draft over and above the sum of \$793.81, namely, the sum of \$1,852.21, with interest thereon from March 28, 1885 (which was the day of payment of the draft), to the making of the final decree. A majority of the court is of the opinion that the entry should be, decree affirmed.

FIELD AND W. ALLEN, JJ., dissented. The grounds of dissent were, that the defendant Randall, whose property the draft was, was not a resident or citizen of Massachusetts, and its courts were therefore without jurisdiction to render any personal decree against him; that the draft was issued by the United States, and they were not amenable to any process which could be issued out of a state court; that the draft was not a chattel subject to execution by the laws of Massachusetts, and that, as its owner was beyond the jurisdiction of the court, it had no power to compel him to transfer it to a receiver or trustee to subject it to execution; that any decree which the court could make could only operate *in personam*, and under the decision in *Hart v. Samson*, 110 U. S. 151, could not even operate *in personam*, because Randall, the owner, was not within the state.

ATTACHMENT AND GARNISHMENT. — A FOREIGN CORPORATION DOING BUSINESS IN THIS STATE MAY BE GARNISHED for a debt due to a non-resident employee, contracted outside this state, and exempt from garnishment in the state where defendant and the garnishee reside: *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497. An attachment may be levied

on any visible or tangible effects of a non-resident debtor in his actual or constructive possession: *Dorrier v. Masters*, 83 Va. 459. The levy of the attachment, as shown by the officer's return on a non-resident's property, is the very foundation of a suit by attachment against such defendant, and if the property which has been attached is not that of defendant, the court is without jurisdiction: *Culbertson v. Stevens*, 83 Id. 406.

STATUTE OF LIMITATIONS. — "RESIDE WITHOUT THE STATE," IN STATUTORY PROVISION that the statute of limitations shall not run in favor of any one during the time he shall be absent from and reside without the state, means only an established residence or home without the state: *Bucknam v. Thompson*, 38 Me. 171; 61 Am. Dec. 237. Under the construction put upon the New Hampshire statute of limitations, where the absence of a party from the state is such that no personal service can be had upon him, the statute does not run, and the time of absence must be deducted from the time named in the statute: *Ward v. Cole*, 32 N. H. 452; 64 Am. Dec. 378. The Maine statute of limitations is no bar to an action in that state upon a note made in another state, where the defendant has not resided in Maine since the date of the note: *Brown v. Nourse*, 55 Me. 230; 86 Id. 406; and see note to *Cook's Ex'r v. Holmes*, 77 Am. Dec. 550, and *Ward v. Cole*, 64 Id. 380, for the effect of temporary absence from the state upon the running of the statute of limitations. The New York statute of limitations does not avail a debtor who was absent from the state while the claim was running: *Case v. Cushman*, 3 Watts & S. 544; 39 Am. Dec. 47. A non-resident of the state, who is a resident of one of the United States, is not barred by the statute of limitations in an action of ejectment: *Pancoast v. Addison*, 1 Har. & J. 350; 2 Am. Dec. 520; *Forbes v. Foot*, 2 McCord, 331; 13 Am. Dec. 732. The operation of the statute of limitations upon a promissory note is not, under Massachusetts statutes, suspended by the temporary absence of the maker from the state, but only by an absence of such a character as works a change of his domicile: *Slocum v. Riley*, 145 Mass. 370. Where a defendant, in an action against him on an open account, relies upon the statute of limitations for a defense, he must establish the fact that he has been present in person within the state the period required by the statute since the date of the last item of the account, and prior to the date of the commencement of the suit thereon: *Conlon v. Lanphear*, 37 Kan. 431. Where a debtor is out of the state when the cause of action accrues, the statute of limitations does not begin to run till he returns to the state proposing to make it his residence; and where, after a cause of action accrues, a debtor leaves the state, and makes his residence out of it, the time of absence from the state will not be taken as part of the time limited for the commencement of the action; and where, after a cause of action has accrued, the debtor leaves the state, and is absent for a year or more, although he does not change his domicile, the time of his absence will not be counted on a plea of the statute of limitations; and where the debtor was a non-resident of the state, but was here on visits of a day or two each year, such visits will not have the effect of setting in operation the statute of limitations, and the cause of action will not be barred, although more than the time required to bar it has elapsed since the cause of action accrued: *Armfield v. Moore*, 97 N. C. 34.

HEINLEIN v. BOSTON AND PROVIDENCE R. R. Co.

[147 MASSACHUSETTS, 186.]

CARRIER OF PASSENGER — RIGHTS OF INTENDING PASSENGER, WHEN CRASH. —

One remaining at a railroad station three or four minutes after he knows that the train which he wished to take had already gone, when there was nothing to detain him except his wish to take a street-car which would soon arrive at such station, ceases to have the rights of an intending passenger, and cannot recover for injuries sustained by him in attempting to leave the station by reason of the station door being closed, the station lights put out, and the passage by which he endeavored to depart insufficiently lighted.

TORT for personal injuries. The court directed a judgment to be entered for the defendants. Plaintiff excepted.

N. U. Walker, for the plaintiff.

G. Putnam and T. Russell, for the defendant.

DEVENS, J. The plaintiff entered the waiting-room of the defendant's station in Roxbury, intending to take the last evening train for Boston, for which one of two friends who accompanied him had informed him he was in time. In fact, it had been gone some fifteen minutes. With his friends, the plaintiff remained "three minutes, or something like that," as he stated on cross-examination, or "about two minutes," as other witnesses stated, in conversation with them. The station agent was there clearing up the station, but no inquiries were made of him or any one on the subject of the train. At the end of this time, the plaintiff was informed by his friend that the last train to Boston had gone, and that he would have to take a horse-car. He waited "a minute or two," as he states in his examination in chief, or "three or four minutes," as he states in his cross-examination, in the defendant's station. He further testified: "I was waiting for a horse-car after I found the train had gone; I did not go there for a horse-car." One of those who accompanied him states that after being informed that the only way the plaintiff could get into Boston "was to take the horse-cars," adds, "We thought we could wait in the depot until one came along." At the expiration of the time which the plaintiff had waited, after being informed that the last train had gone, whether it was "one or two minutes," or whether it was "three or four," he determined to leave the station. He then found that the door leading to the street, by which he had entered, was locked, and he crossed the waiting-room to go out by the door leading to the platform. At this

time, the lights in the ticket-office and waiting-room were extinguished, by which some light was thrown upon the door or step leading to the platform, which platform was then lighted by an electric light which left the step in shadow. There was evidence that the plaintiff was injured by reason of the insufficient light on this step. Whether there was sufficient evidence that he was in the exercise of due care, as he stepped out towards the platform, was in dispute.

It is the contention of the plaintiff that he was on the premises at the invitation of the defendant, and that the company was bound to see that its premises were in such condition, in all respects, that such a person, in the exercise of ordinary care, could leave them without injury, and that this extends to and embraces proper and suitable platforms, steps, and walks, as well as suitable lights. The only obligation that the defendant could have been under to the plaintiff was that which it owed to one intending to become a passenger in one of its trains, who would have a right to use the waiting-room for a reasonable time before the arrival of the expected train, or to one who sought information as to the time of departure or arrival of trains in which he was interested. Admitting that as to such persons there was a duty such as is claimed by the plaintiff owing from the defendant, by reason of an implied invitation on its part to enter the waiting-room in which the ticket-office was situated, and without discussing whether, in view of the fact that there was to be no train such as he desired, and that he remained for two or three minutes without making any inquiry, the plaintiff could up to the time that he was informed that there was no train such as he desired, be held to have the rights of an intending passenger, or of a person seeking information, we are of opinion that after that time he had no such rights, if he continued to remain in the station after he had full opportunity to leave it.

While the defendant could, of course, do him no wanton injury, it had a right to conduct its business in the ordinary way, without regard to his comfort or convenience. When he arrived he found the station-master clearing up the station, the time for closing it had arrived, and if the plaintiff saw fit to linger, the defendant's servant had a right to proceed to close the station and extinguish the lights. There was ample time for him to have retired while the light in the waiting-room was burning. This room was not a place where every one might resort and use it for his own business, and he could

not expect that it, or the way out of it, would be kept lighted until the arrival of the horse-car for which, as he states, he waited. Whether, after he knew that there was no railroad train for him, he is to be considered a trespasser or a mere licensee, is not important. He could have no higher character than the latter. There was no allurement or inducement held out for him to remain, and if he did so, it was at his own risk. In order that it may be held that thereafter the defendant owed any duty to him, it should be shown, not merely that it or its servant acquiesced in his remaining, and permitted it when his only possible business had been concluded, but that it was in accordance with their invitation, or with the intention and design with which the waiting-room was prepared to be used. Of this there was no evidence.

The plaintiff urges that the inquiry should have been submitted to the jury, as a question of fact, whether he remained an unreasonable time, or for an unauthorized purpose. On the plaintiff's own statement, three or four minutes elapsed before the light in the station was put out, and during this time he had remained for his own convenience. Upon these facts a verdict that he had remained only a reasonable time, or for an authorized purpose, would not have been justified. Nothing was shown to have been done willfully or wantonly to the injury of the plaintiff, and upon these facts the presiding judge properly ruled that he was not entitled to recover.

In this view of the case, it is unnecessary to inquire whether there was sufficient evidence that the plaintiff himself was in the exercise of due care in the manner in which he left the station.

Exceptions overruled.

CARRIERS — WHEN ONE CEASES TO BE A PASSENGER. — WHERE A RAILROAD TRAIN RAN PAST A STATION, and a passenger for such station got off while the train was still in motion, and was killed by another train while making his way back to the station, he ceased to be a passenger, and the company was not liable: *Commonwealth v. Boston etc. R. R. Co.*, 129 Mass. 500; 37 Am. Rep. 382. A person who has bought a railway ticket and is merely crossing a side-track for the purpose of taking the train is not a passenger and cannot recover as such if injured: *Indiana Cent. R'y Co. v. Hudson*, 1 Ind. 325; 74 Am. Dec. 254.

June, 1888.]

ADAMS v. MESSINGER.

ADAMS v. MESSINGER.

[147 MASSACHUSETTS, 185.]

SPECIFIC PERFORMANCE WILL BE DECREED OF A CONTRACT FOR THE SALE OF PERSONAL PROPERTY in the absence of an adequate remedy at law, where stocks are sold which are limited in amount, held in a few hands, and not ordinarily to be obtained, or where articles of a personal character are peculiar or individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, and the like.

SPECIFIC PERFORMANCE WILL BE DECREED OF A CONTRACT BY THE SALE OF A PATENT RIGHT to furnish articles covered by his patent, and therefore, he alone can supply, when such articles can be made only by the exercise of any peculiar skill or ability.

SPECIFIC PERFORMANCE WILL BE DECREED OF A CONTRACT TO OBTAIN PATENTS IN A FOREIGN COUNTRY for improvements which should be made after be made in certain described articles or machinery, and to obtain such patents when obtained.

SPECIFIC PERFORMANCE OF PART OF A CONTRACT MAY BE DECREED when the contract consists of two distinctly separable parts. Even if it relates to a single subject, the defendant may be compelled to perform in part, and compensate the complainant for the part which cannot be performed. It is not necessary that it be possible to compute what is just, so far as the contract is performed.

BILL in equity for the specific performance of an agreement to assess damages sustained by its non-performance, and to enjoin defendant from disposing of letters patent, contrary to the terms of such agreement. By the agreement in question the defendant obligated himself,—1. To furnish plaintiff with certain injectors within three months, at the price of five hundred dollars each; 2. To furnish certain other injectors within six months; 3. That the injectors furnished should be made in accordance with certain letters patent, giving dates and numbers of such letters; 4. That if plaintiff should make any improvements in such injectors, he or his heirs or assigns should forthwith apply for letters patent thereupon in the dominion of Canada, and on receiving such letters, should assign them to the plaintiff. The bill stated that letters patent had been taken out in the United States on improvements in the injectors, but the defendant refused to apply for letters patent thereon in Canada, or to assign such letters. The bill was demurred to on the ground of want of equity; that the contract of which specific performance was sought was a contract for personal services, and involved the building of a machine embodying a patent, and that the securing of letters patent in a foreign government cannot be the subject of a

cree for specific performance. The demurrer was sustained. Thereupon plaintiff appealed to a full court.

C. S. Knowles, for the defendant.

W. B. Durant, for the plaintiff.

DEVENS, J. It is the contention of the defendant, that the plaintiff has a full, complete, and adequate remedy at common law by an action for damages, and that the court sitting in equity cannot grant the relief sought by the prayer of the bill.

The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the statute of frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have of course no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character.

Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract: *Story's Eq. Jur.*, sec. 717; *Clark v. Flint*, 22 Pick. 231; 33 Am. Dec. 733. A contract for bank, railway, or other corporation stock freely sold in the market might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained: *White v. Schuyler*, 1 Abb. Pr., N. S., 300; *Treasurer v. Commercial Mining Co.*, 23 Cal. 390; *Pool v. Middleton*, 29 Beav. 646; *Doloret v. Rothschild*, 1 Sim. & St. 590; see *Chaffee v. Middlesex Railroad*, 146 Mass. 224.

Where articles of personal property are also peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures,

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curiosities, family furniture, or heir-looms, specific performance of a contract in relation to them will be decreed: *L. Loaring*, 6 Ves. 773; *Fells v. Read*, 3 Ves. Jr. 70; *Low v. Lowther*, 13 Ves. 95; *Williams v. Howard*, 3 Murph. 7. An agreement to assign a patent will be specifically enforced: *Binney v. Annan*, 107 Mass. 94; 9 Am. Rep. 10. Nor can we perceive any reason why an agreement to furnish articles of which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, should not also be thus enforced: *Hapgood v. Rosenstock*, 22 Am. Rep. 86. As the value of a patent right cannot be ascertained by computation, so it is impossible with any approach to accuracy to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold, to furnish and deliver certain described working steam-injectors within a specified time to the plaintiff, and also that, if the defendant should make improvements in injectors for steam-boilers, he should take out patents therefor in the United States, he should apply for letters patent in Canada, and on obtaining the same, he would assign and convey the same to the plaintiff, and that he would not do any act prejudicial to these letters patent of Canada or the monopoly thus secured.

It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and that therefore the defendant cannot be ordered to make and deliver injectors contracted for. But the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot mold its order and so supervise the individual execution, so that it can determine whether he has honestly obeyed or not, has no application here.

The defendant has agreed to furnish and deliver certain injectors, which the contract shows to be patented articles. It does not appear from the bill that they were yet to be made when the contract was executed. But if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any intelligent artificer in the metals of which they are composed. The details of their manufacture are given by reference to patents which are referred to in the agreement, so that

difficulty such as has sometimes been experienced could have been found in describing accurately, and even minutely, the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court.

Agreements to make an archway under a railway, or to construct a siding at a particular point for the convenience of the land-owner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them; and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility or the labor of doing that which the defendant had agreed to do: *Storer v. Great Western R'y*, 2 Younge & C. Ch. 48; *Greene v. West Cheshire R'y*, L. R. 13 Eq. 44. The case at bar is readily distinguishable from that of *Wollensack v. Briggs*, 20 Ill. App. 50, on which the defendant much relies. In that case, the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the contract which relates to the application for letters patent in Canada, and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should not be enforced specifically, and the plaintiff compensated in damages for the breach of the other.

When a contract relates to but a single subject, and it is impossible for the defendant to perform it, except partially, the plaintiff is entitled to the benefit of such partial performance, and to compensation, if it be possible to compute what is just, so far as it is unperformed. It was therefore held in *Davis v. Parker*, 14 Allen, 94, that where one had agreed to convey land with release of dower, and was unable to procure

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a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase money of the value of the wife's interest at the time of the conveyance. See also *Milkman v. Ordway*, 106 Mass. 232; *Curran v. Holyoke Water Power Co.*, 116 Id. 90.

We have assumed, in favor of the defendant's contention, that the only relief that the plaintiff could obtain for breach of that portion of the agreement which relates to the application for a patent in Canada, for the improvement of which the defendant had made, would be in damages. We have not intended thus to decide. That equity, by virtue of its control over the persons before the court takes cognizance of many things which they may do or be able to do abroad while they are themselves personally here, will not be converted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record: *Pingree v. C*, 12 Gray, 288; *Dehon v. Foster*, 4 Allen, 545; *Cunningham v. Butler*, 142 Mass. 47; 56 Am. Rep. 657; *Newton v. Bronson*, N. Y. 587; 67 Am. Rep. 89; *Bailey v. Ryder*, 10 N. Y. 36.

There is nothing to show that the defendant, in making application in Canada for the patent, is compelled to do so in the state, any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted by the party would be ordered to make application. It was so in *Runstetler v. Atkinson*, McAr. & M. 382, that where a formal assignment of an invention had not been made, but a verbal agreement had been made to assign, equity would order the party to make the formal assignment, and also to make application for the patent which, in such case, would issue to the assignee. The laws of Canada, which we can know only by facts, are not before us by any allegations as to them. If that is required by them is a formal application in writing by the inventor, there would seem to be, from the allegations in the bill, sufficient reason why the defendant should be required to make and forward it, or place it in the hands of the plaintiff to be forwarded to the Canadian authorities.

In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill taken in connection with the terms of the agreement set forth a good reason why

plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way encumbering any right he may have to letters patent from Canada, if the plaintiff should decide to seek his remedy in this form, rather than in damages for breach of this part of the contract.

Demurrer overruled.

SPECIFIC PERFORMANCE OF CONTRACTS BY COURTS OF EQUITY: See extended note to *Anderson v. Green*, 23 Am. Dec. 423-431. Where plaintiff and defendant entered into an oral agreement whereby a certain invention of defendant, and all the letters patent granted therefor, should be their joint property, and the plaintiff was to contribute the money to procure letters patent, and both were to use their best efforts to make the invention remunerative, and a suit was brought by plaintiff for specific performance, it was held that the agreement came within the jurisdiction of equity for enforcement, although it was oral, because it was not within the statute of frauds, and no adequate remedy was attainable at law: *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459. A court of equity will not decree the specific performance of a contract, if the contract is not clearly and certainly established; so that the specific performance of a contract may be said to be, not an absolute right in equity to him who asks it, but a matter of sound discretion in the court, and it will not decree specific performance in cases of fraud, mistake, or of unconscionable agreements, when such a decree would work an injustice, and generally not even in cases in which the decree would be at all inequitable under the circumstances of the case: *Veth v. Gierth*, 92 Mo. 97; *Kelley v. Cent. Pac. R. R. Co.*, 74 Cal. 557; 5 Am. St. Rep. 470; *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44, and note 45. The chancellor will not decree a specific performance of a contract, if the legal remedy is adequate, or if, under the circumstances of the case, the decree would be inequitable or unjust: *Simon v. Wildt*, 84 Ky. 157.

SPECIFIC PERFORMANCE OF CONTRACTS FOR SALE OF PERSONALTY WILL NOT GENERALLY be enforced in equity, but there are exceptions to the rule: *Kimball v. Morton*, 5 N. J. Eq. 26; 43 Am. Dec. 621. Ordinarily a court of equity will not decree a specific performance of a contract in reference to personalty, unless it clearly appears that by the very nature of the contract, the character of the subject-matter, or other special and peculiar causes, a court of law cannot give the adequate relief by compensation in damages for a breach of the contract: *Dilburn v. Youngblood*, 85 Ala. 449.

RUSSIA CEMENT COMPANY v. LE PAGE.

[147 MASSACHUSETTS, 203.]

TRADE-MARK OR NAME. — THE INTRODUCTION OF THE WORD “IMPROVED” into the name of an article manufactured by the defendant will not justify its use, if, in other respects, the plaintiff has just grounds to object to it.

TRADE-MARK OR NAME. — ONE MAY PART WITH THE RIGHT TO USE HIS OWN NAME AS A DESIGNATION or description of a manufactured article, and confer that right exclusively upon another. In that event he may be enjoined from using his own name as a description of an article of his own manufacture, and from selling the article under that particular name.

ONE PARTS WITH THE RIGHT TO USE HIS OWN NAME AS A TRADE-MARK OR NAME, when, having permitted it to be used as part of a trade-mark or mark of a partnership of which he was a member, the partner sells their business and “the right to use the trade-marks belonging to the partnership in use by said copartnership.”

BILL to enjoin the defendant, William M. Le Page, from using as trade-marks the words “Le Page’s Liquid Glue” and “Le Page’s Improved Liquid Glue,” and from carrying on business under the name of “Le Page’s Liquid Glue Company.”

Defendant and one Brooks, while in business as partners, carried on the manufacture and sale of glues under the name of the Russia Cement Company, adopted as the trade name of the class of their glues the words “Le Page’s Liquid Glue.” Two years later they sold to the corporation plaintiff all the assets of the firm, including “the good-will of the business and the right to use the trade-marks belonging to or in use by the copartnership.” The defendant was an officer of the corporation plaintiff for four years after its purchase of these assets and rights. At the end of this time he withdrew from the corporation and entered into business upon his own account in the manufacture and sale of glues. He called the glues sold by him “Le Page’s Improved Liquid Glue”; and adopted the same name and address, “Le Page’s Liquid Glue and Cement Company, Gloucester, Mass.” Decree in favor of the defendant, dismissing the bill, and refusing the injunction; but the case was reported for the consideration of the whole court.

E. R. Hoar and C. Browne, for the plaintiff.

W. Gaston, F. Forbes, and F. L. Washburn, for the defendant.

DEVENS, J. The plaintiff and the defendant are manufacturers of liquid glue, and the defendant, whose name

Le Page, uses the same as that used by the plaintiff to describe his glue, and by which to advertise it, except that he introduces therein the word "Improved." The introduction of this word into the name of the article manufactured by him does not justify its use, if in other respects the plaintiff has just ground to object to it: *Sebastian on Trade-marks*, 52; *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450, 462; *Gillis v. Hall*, 2 Brewst. 342.

A person cannot make a trade-mark of his own name, and thus debar another having the same name from using it in his business, if he does so honestly, and without any intention to appropriate wrongfully the good-will of a business already established by others of the name. Every one has the absolute right to use his own name honestly in his own business for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which to those having a common right to it are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name: *Holloway v. Holloway*, 13 Beav. 209; *Meneely v. Meneely*, 62 N. Y. 427; 20 Am. Rep. 489; *Gilman v. Hunnewell*, 122 Mass. 139; *Rogers v. Rogers*, 53 Conn. 121; 55 Am. Rep. 78.

While this is the general rule, it is also true that one may so sell or part with the right to use his own name as a description or designation of a manufactured article as to deprive himself of the right to use it as such, and confer this right upon another. A name used as an adjective of description is not necessarily understood by the public as any assertion that the person whose name is used is the maker of the article. One who has carried on a business under a trade name, and sold a particular article in such a manner, by the use of his name as a trade-mark or a trade name, as to cause the business or the article to become known or established in favor under such name, may sell or assign such trade name or trade-mark when he sells the business or manufacture, and by such sale or assignment conclude himself from the further use of it in a similar way: *Horton Mfg. Co. v. Horton Mfg. Co.*, 18 Fed. Rep. 816; *McLean v. Fleming*, 96 U. S. 245; *Dixon Cru-*

cible Co. v. Guggenheim, 2 Brewst. 321; *Probasco v. Bouyon*, 1 Mo. App. 241; *Oakes v. Tonsmierre*, 4 Woods, 547, 555; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Ainsworth v. Walmsley*, L. R. 1 Eq. 518, 524; *Shaver v. Shaver*, 54 Iowa, 208; 37 Am. Rep. 194; *Frazer v. Frazer Lubricator Co.*, *supra*.

A person may be enjoined, therefore, from using his own name as a description of an article of his own manufacture, and from selling the article under that particular name, when he has parted with the right thus to apply it: *Gillis v. Hall*, 2 Brewst. 342; *Kidd v. Johnson*, 100 U. S. 617, 619. It is not upon the ground of the invasion of the trade name adopted by another, but by reason of the contract he has made, that he is deprived of the right himself to use his name as all others of the same name may use theirs.

The recent case of *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149, which has been decided since the decree originally made in the case at bar was rendered, is quite conclusive in regard to it. It was there held that "A. N. Hoxie's Mineral Soap" and "A. N. Hoxie's Pumice Soap" were trade-marks, and assignable as such, and that they did not necessarily mean that the soaps were made by A. N. Hoxie. In that case, one who had adopted these trade-marks, or, more properly, trade names, for his manufacture, entered into a partnership with another under articles by which he contributed the good-will of the business he was carrying on, with the tools, implements, and fixtures, and on the dissolution of this partnership conveyed to his partner "all my right, title, and interest in and to all and singular the partnership property belonging to the firm, meaning hereby to sell and convey all my interest in the entire assets of said firm"; and it was further held that these trade names became, by the articles of copartnership, a part of the property of the firm, and that the right to use them as such passed by the bill of sale, and that the partner so conveying had parted with his own right so to use them.

Upon the evidence in the case at bar, it appears that "Le Page's Liquid Glue" was the name adopted by Brooks and Le Page for the light glues manufactured by them, a special word, such as "straw," "carriage," etc., indicating for what especial use the particular light glue was designed, being inserted before the word "glue"; that they manufactured glues under this name, and at a subsequent period, in 1882, formed the plaintiff corporation, to which they sold their business, and which continued the manufacture of these glues under the

same name. The defendant was a member of the corporation, and a director thereof until February, 1886. He then left it, and shortly after engaged in the manufacture and sale of glue at Gloucester, where the plaintiff's business has always been carried on, using the name "Le Page's Improved Liquid Glue" to advertise the article produced by him.

When Brooks and Le Page sold their business to the plaintiff, they in express terms sold "the right to use the trade-marks belonging to or in use by said copartnership." When Le Page (with Brooks) sold to the corporation, and when he left the corporation, it must be held that the name "Le Page's Liquid Glue" was a trade name or trade-mark, and it is not important which term is used, indicating the liquid glue which the plaintiff was manufacturing. The right to use it as such was necessarily an exclusive use, as it was intended thus to distinguish the plaintiff's goods from those of others. As a trade-mark belonging to the corporation, the defendant, while an officer thereof, had himself sought to obtain registration for it at the United States patent office.

We are of opinion, therefore, that the defendant should be enjoined from using the words "Le Page's Improved Liquid Glue," or "Le Page's Liquid Glue," to describe the article manufactured by him, and from describing the company under whose name he conducts his business as "Le Page's Liquid Glue Company," whether with or without any addition thereto.

While the plaintiff has not sought to prevent the defendant from manufacturing glue, we add, in order to avoid misunderstanding, that while the defendant cannot use the words adopted as a trade name for the article manufactured by him, we do not decide that he may not use the words "Liquid Glue," or other appropriate words, to describe his product, or to state in that connection that he is himself the manufacturer of it.

Decree for the plaintiff. —

TRADE-MARKS. — WHAT MAY BE USED AS A TRADE-MARK: See note to *Pratt's Appeal*, 2 Am. St. Rep. 681; *American etc. Button Co. v. Anthony*, 15 R. I. 338; 2 Am. St. Rep. 898, and note 901.

TRADE-MARKS. — AS A GENERAL RULE, A PARTY USING HIS OWN NAME AS A TRADE-MARK cannot deprive another having the same name from using it also as a trade-mark, provided the latter does not resort to device, trick, or artifice to create the impression that the goods manufactured by him, or sold by him, are made and sold by the former. One may grant the exclusive right to use his name to another in connection with the manufacture and sale of a certain commodity, and having done so, he will be enjoined from

subsequently using his own name in connection with the manufacture and sale of a like product; nor can he afterwards resume his name in the carrying on of the same business: *Fraser v. Fraser Lubricator Co.*, 121 Ill. 147; 2 Am. St. Rep. 73, and note 81. When the second bearer of a name which has become the distinguishing part of a trade-mark used by another manufacturer uses the same name as a part of his own trade-mark, with proper distinguishing devices, it is not a ground for enjoining the latter against the use of the name that the goods of both manufacturers become known in the market by the same name, for one must not suffer by any use the public may make of a mark which he is legally entitled to use: *Rogers Mfg. Co. v. Simpson etc. Co.*, 54 Conn. 527.

SHERRY v. PERKINS.

[147 MASSACHUSETTS, 212.]

§VICES TO PREVENT PERSONS FROM ENTERING INTO OR CONTINUING IN THE EMPLOYMENT OF ANOTHER, as by threats, intimidation, display of banners, and the like, are illegal, both at common law and by the statutes of Massachusetts.

§JUNCTION WILL ISSUE TO PREVENT THE MAKING AND CARRYING OF BANNERS IN FRONT OF COMPLAINANT'S PLACE OF BUSINESS for the purpose of preventing workmen from entering into or continuing in his employ.

BILL in equity seeking to restrain the defendants from making banners, and carrying and causing them to be carried in front of complainant's place of business. The complainant was engaged in the business of making boots and shoes, and had in his employment numerous operatives. The defendants were members of a voluntary association called the Lasters' Protective Union. The complainant's mode of compensating his employees did not conform to the laws of this association, and its members had therefore manufactured, and caused to be carried in front of plaintiff's factory, a banner bearing this inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U. This banner caused crowds of people to gather in front of the factory, and the lasters in plaintiff's employ to leave their work. The defendants also called upon various lasters who had been employed by plaintiff, and intimidated some of them and injured others, and it was claimed that the banners and the acts of the defendants were part of a scheme to prevent lasters from entering plaintiff's employment. The banner had been carried in front of plaintiff's factory from January 8, 1887, until March 22d of the same year. On the last-named day, the defendants caused another banner to be carried in front of the factory, on which were inscribed the following words: "Lasters on a strike, and

the present trouble is settled. Per order L. P. U." The case was heard before C. Allen, judge, who reported it for the consideration of the full court.

R. Lund, F. Hurlburt, and T. M. Osborne, for the plaintiffs.

J. R. Baldwin, for the defendants.

W. ALLEN, J. The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs from continuing in such employment, and to prevent others from entering into such employment; that the banners with their inscriptions were used by the defendants as part of the scheme, and that the plaintiffs were thereby injured in their business and property.

The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute: Pub. Stats., c. 74, sec. 2; *Walker v. Cronin*, 107 Mass. 555. We think that the plaintiffs are not restricted to their remedy by an action at law, but are entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiff's bill, and continued to be used at the time of the hearing. The injury was to the plaintiffs' business, and adequate remedy could not be given by damages in a suit at law.

The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiffs' business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiffs' business. The scheme, in pursuance of which the banners were displayed and maintained, was to injure the plaintiffs' business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiffs. The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against: *Gilbert v. Mickle*, 4 Sand. Ch. 857; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

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Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. (Am. Rep. 310, was a case of defamation only. Some language in *Springhead Spinning Co. v. Riley*, *supra*, has criticised, but the decision has not been overruled. See *Diatite Co. v. Florence Mfg. Co.*, *supra*; *Prudential Assn Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, L. C. P. D. 339; *Thorley's Cattle Food Co. v. Massam*, L. Ch. Div. 763; *Thomas v. Williams*, L. R. 14 Ch. Div. 864; *v. Brownrigg*, L. R. 10 Ch. Div. 294; *Gaskin v. Balls*, L. Ch. Div. 324; *Hill v. Davies*, L. R. 21 Ch. Div. 798; *L. Bean*, L. R. 26 Ch. Div. 306.

Decree for the plaintiffs.

ACTS OF PERSONS IN COMBINING TO INTIMIDATE AN EMPLOYER, AND TO PERSUADE HIM, AGAINST HIS WILL, TO DISCHARGE his workmen, and employ other persons as the conspirators may demand, fall within the prohibition of the Connecticut act of 1872, which subjects to punishment "every person who shall threaten or use any means to intimidate any person to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him": *State v. Glidden*, 55 Conn. 46; 3 Am. St. Rep. 23.

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[147 MASSACHUSETTS, 245.]

DEFECT IN HIGHWAY FOR WHICH TOWN IS ANSWERABLE MUST BE THAT IT IS THE SOLE CAUSE OF THE INJURY COMPLAINED OF. If such injury be the combined result of the defect, united with some distinct, efficient, and concurring cause, the town is not liable for the injury unless the concurring cause be a pure accident unaided by human agency.

TOWN IS NOT LIABLE TO A PERSON WHO IS INJURED BY THE FALL OF A DERRICK IN A HIGHWAY, when the derrick was then in use, and the injury was occasioned by the fact that it was so insufficiently supported by guy-ropes that it was pulled from its position by its weight and the weight of a stone which was then being lifted by it.

TOWN IS NOT RESPONSIBLE FOR THE ACTS OF HIGHWAY SURVEYORS OR MEN EMPLOYED BY THEM ENGAGED IN THE PERFORMANCE OF THE DUTY IMPROVED UPON THEM BY LAW TO REPAIR THE HIGHWAYS. This rule is applicable, though the town made a special appropriation for the work, and its selectmen, having general oversight of the district, told the surveyor that the appropriation had been made, and that the work was to be done when the proper time arrived.

TORT. The plaintiff's declaration contained two counts. The first sought to disclose a supposed liability existing against the defendant by reason of its duty to keep the

for the repair of the culvert in that street fell, by its own weight and that of a load placed upon it, upon the plaintiff while he was lawfully passing upon the street in the exercise of due care. The second count set forth a cause of action at common law, and relied upon the supposed liability of the defendant for the neglect of its servants while engaged in the repair of the same street. At the annual town meeting in March, 1885, the defendant voted "to raise and appropriate for highways, town-ways, and bridges, nine thousand dollars, seven hundred to be expended by each highway surveyor, balance by selectmen; and to raise and appropriate the sum of two hundred dollars for the purpose of enlarging the drain across Broad Street, also the drain across Commercial Street." At a meeting of the selectmen, held subsequently in the same month, an assignment was made of the highways in each ward to the surveyor chosen for that ward, and in pursuance of such assignment the following notice was sent: "To Weston H. Cushing, surveyor of highways for the town of Weymouth: All the highways, town-ways, and bridges within the limits of Ward 2 are assigned to you to keep in repair during the current year." By reason of this assignment, Cushing took charge of the work, and was in charge thereof when the derrick fell upon and injured the plaintiff. Section 18 of chapter 52 of the Public Statutes of Massachusetts, on which plaintiff relied, declares that "if any person receives or suffers bodily injury, or damage in his property, through a defect or want of repair or of sufficient railing in or upon a highway, town-way, causeway, or bridge, which might have been remedied, or which damage or injury might have been prevented by reasonable care and diligence on the part of the county, town, place, or persons by law obliged to repair the same, he may recover, in the manner hereinafter provided, of the said county, town, place, or persons, the amount of damages sustained thereby, if such county, town, place, or persons had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on their part; but no such damage shall be recovered by a person whose carriage and the load therein exceed the weight of six tons." The trial judge decided that, upon the evidence, the action could not be sustained, and directed a verdict to be entered for the defendant, but reported the case for the determination of the appellate court.

R. D. Smith, O. Q. Terrell, and N. H. Pratt, for the plaintiff.

H. E. Swasey and R. M. Morse, Jr., for the defendant.

DEVENS, S. The superior court having ruled upon the evidence offered by the plaintiff that he was not entitled to recover, and having ordered a verdict for the defendant, the question is presented whether, upon either of the two causes of action set forth in the different counts of the plaintiff's declaration, he was entitled to have the case submitted to the jury. We shall not have occasion to consider whether the plaintiff was to be deemed a traveler upon the highway, which the defendant was bound to keep in repair, or whether, if the cause of the injury to the plaintiff was a defect therein for which the defendant was responsible, it had sufficient notice thereof, or whether proper notice of the injury, as required by statute, was given to the defendant before the action was brought, but shall assume that these subsidiary or preliminary inquiries should be answered in favor of the plaintiff.

The ground upon which the plaintiff sought to recover under his first count was by virtue of the statute for an injury received through a defect or want of repair in the highway which the defendant was bound to maintain. Pub. Stats., c. 52, sec. 18. There was evidence that a derrick was erected and standing in the traveled part of the road, to be used in repairing a culvert which extended across the road, and that the derrick was insufficiently and insecurely supported, one of the guy-ropes extending into a neighboring meadow, and being there attached to a railroad sleeper buried in the ground, but so defectively fixed that it was pulled from its position by the weight of the derrick and by that of a stone which was being lifted thereby. By reason of this, the derrick, while thus in use by the workmen, fell upon the plaintiff, then passing in the highway, and injured him.

Whether a derrick standing in the highway and impeding travelers thereon, if one had actually collided with it, and whether a derrick thus situated, and so insecurely fixed that it was liable to and did fall from its own weight, or from purely natural causes, could be held to be a defect for which a town would be responsible, are questions not necessary now to discuss. The position of the plaintiff is, that a derrick standing in the highway, and defectively supported so that it falls when in use, is a defect for which the town is or may be

liable; and thus, that a machine used on the highway for the purpose of repairing it, controlled, worked, and manipulated at the time by workmen, becomes a defect, if, by reason that it is thus operated, and that it is not sufficiently supported, injury is occasioned by its fall to one lawfully on the highway. To maintain his proposition, the plaintiff relies much on *Drake v. Lowell*, 13 Met. 292, *Day v. Milford*, 5 Allen, 98, and *Pedrick v. Bailey*, 12 Gray, 161, 163, sometimes familiarly known as the awning cases. These decisions were put exclusively on the ground of the insufficient strength or defective condition of structures which were not mere incidents or attachments of the building, but were adapted to the sidewalk, and were a part of its construction and arrangement for use as such. It was deemed that danger from their insecure condition might properly be treated as arising from a defective or unsafe condition of the sidewalk. Where a sign, attached to the building only, fell, it was held, as in the case where ice overhung the sidewalk, that there was no liability of the town as for a defective highway: *Jones v. Boston*, 104 Mass. 75; 6 Am. Rep. 194; *Hixon v. Lowell*, 13 Gray, 59. But in a case where a sign or transparency was supported above the sidewalk by a pole or post placed thereon, and injury was occasioned by the fall of the pole, it was held to come within the cases in regard to awnings above cited: *West v. Lynn*, 110 Mass. 514. This class of cases has been repeatedly said to express the extreme limit, in this direction, to which the liability of towns should be extended: *Barber v. Roxbury*, 11 Allen, 318; *Jones v. Boston*, *supra*. In all of them, the injury done was occasioned by the operation of purely natural causes, and did not proceed from any human agencies, as where a machine is controlled and managed by the laborers engaged thereon.

In *Barber v. Roxbury*, *supra*, a rope was stretched across a highway, attached at each end to objects outside the limits of the highway, and when not in use, lay loosely on the ground, not forming any obstruction to public travel until the men engaged in moving stone by means of the derrick raised the rope gradually by turning the crank to which it was attached, so as to lift the rope from the ground across the traveled space. The rope, while being so raised, struck the plaintiff's carriage, and injured her. It was held that such injury could not be said to have been caused by any defect or want of repair in the highway.

June, 1888.] PRATT v. INHABITANTS OF WEYMOUTH.

The liability for defective highways is a limited one. It has long been settled that a plaintiff cannot recover if the defect is the sole cause of the injury. Where this defect is from a defect united with some distinct, efficient, concurrent cause, without which it would not have happened, unless suggested by Chief Justice Shaw in *Marble v. Worcester*, 395, such concurring cause be pure accident, the plaintiff cannot recover: *Rowell v. Lowell*, 7 Id. 100; 66 Am. 464; *Kidder v. Dunstable*, 7 Gray, 104; *Lyons v. Brookline*, Mass. 491.

Even if it be conceded, therefore, that the derrick was a defect in the highway that if the plaintiff had collided with it, himself exercising due care, or if by its own weight from any natural cause, by reason that it was insufficiently secured, it had fallen upon and injured him, he might recover, such is not the case at bar. It was the act of the workmen, who employed the machine in lifting weights which it was not properly constructed, that contributed to the plaintiff's injury, and was the immediate moving cause. But for this, there is no reason, from the evidence, to suppose it would have occurred. If the defendant is responsible for the act of those who were managing the machine, that will be a liability entirely different from that arising from its negligence in failing to maintain the way, which we shall have occasion hereafter to consider. The derrick did not thereby become a defect in the highway, by the fall of which the defendant was subjected to the statutory liability.

The only case to which we have been referred, or which we have found, where a town has been held responsible, under the statutory liability for a defect in the highway, to a traveler injured therein, in consequence of a defective structure under the control of human agency, and being thus used and worked, is *Hardy v. Keene*, 52 N. H. 370. Apparently the rule in New Hampshire is different from that established in this commonwealth, and towns are held liable for defects in the highway, even where a distinct and independent cause contributes to the injury, unless the traveler's own carelessness is also a contributory cause. The cases in other states, where the legislation and judicial decision differ, cannot always be followed. We are not disposed to accept the proposition that a machine under the active charge of individuals is to be treated as a defect in the highway if injury results from its operation, and not merely from its presence there.

If the defendant was not under a statutory liability to the plaintiff because of a defect or want of repair in the highway, the plaintiff also sought to recover against it upon a common-law liability for the negligence of its agents and servants employed by it in doing certain work which it had undertaken. This cause of action is set forth in the second count of the plaintiff's declaration, and there was evidence that in the erection of an insufficiently supported derrick, and in the operation of it in lifting weights which it was inadequate to sustain, there was negligence on the part of those doing the work of making or repairing the culvert across the road, in which they were engaged.

The question is therefore presented, whether, upon the evidence, Cushing, the person doing the work, and those engaged with him, are to be treated as the agents or servants of the defendant. Cushing was a highway surveyor, regularly chosen as such by the town, and the work was being done within the district assigned to him. That a town is not responsible for the acts of highway surveyors, or the men employed by them, in doing duty imposed upon them by law in the repair of highways, has been repeatedly decided, and the reasons for this exemption have often been stated: *Hafford v. New Bedford*, 16 Gray, 297; *Barney v. Lowell*, 98 Mass. 570; *Walcott v. Swampscott*, 1 Allen, 101; *Tindley v. Salem*, 187 Mass. 171; 50 Am. Rep. 239; *Cushing v. Bedford*, 125 Mass. 528; *Manners v. Haverhill*, 185 Id. 165, 171; *McKenna v. Kimball*, 145 Id. 555; *Clark v. Easton*, 146 Id. 43.

That a town, although it has duly chosen surveyors of highways, may, from time to time, or for special reasons or occasions, undertake to repair its ways and bridges in some other than the regular and statutory manner, and may select and employ men as its agents for this purpose, in which case it would be responsible for torts committed by them, must also be conceded: *Hawks v. Charlemont*, 107 Mass. 414; *Deane v. Randolph*, 132 Id. 475; *Sullivan v. Holyoke*, 185 Id. 273; *Tindley v. Salem*, *supra*; *Waldron v. Haverhill*, 148 Mass. 582. Nor, if the town had undertaken to make the repair of the drain or culvert through an agent selected for the purpose, whom it was entitled to control in the performance of his work, would it be, perhaps, important that such agent was also a highway surveyor.

But in the case at bar the town selected no agent to do this work. It did, indeed, pass a vote "to raise and appropriate

two hundred dollars to enlarge the drain across Broad Street, also the drain across Commercial Street," in the performance of which latter work the injury complained of by the plaintiff occurred; but there is nothing to show that it was not left to be performed by the public officers whom it had chosen according to law, and on their official responsibility as such. The work was itself the repair of a highway, within the scope of Cushing's authority and duty as highway surveyor. In performing it, he had no authority from the town to act otherwise than as a public officer, nor did he attempt to do so, as far as the evidence shows. If he had done so, it would not be important, as it would not be in his power alone to divest himself of his public character and constitute himself the servant of the town. Nor, if it were possible to construe the appropriation for enlarging the drain on Commercial Street, as the plaintiff urges it may be,—in which position we do not concur,—as requiring the selectmen to do this work by employing some suitable person as a servant of the town, does the case afford any evidence that Cushing was thus employed.

A general direction is given to the selectmen over the work of highway surveyors in their respective districts, to see that the money appropriated to such districts is carefully and judiciously expended: Pub. Stats., c. 52, sec. 3; *Benjamin v. Wheeler*, 15 Gray, 486, 490. The responsibility of doing the work, directing the laborers, and taking charge of the repairs is that of the highway surveyor.

The facts that Humphrey, one of the selectmen, told Cushing that there was an appropriation of two hundred dollars to spend in widening the drain across Commercial Street, and that it would come in with the general work when it was the proper time to do it, or when Cushing "saw fit to do it," or that, as Cushing afterwards states, "in substance, Humphrey told me the work was for me to do, when the proper time arrived, in the general work," furnish no evidence of any engagement or contract with Cushing as the agent of the town, or of the selectmen, even if the selectmen had authority to make such engagement.

Judgment on the verdict.

HIGHWAYS. — MUNICIPAL CORPORATIONS ARE REQUIRED TO KEEP THEIR STREETS AND HIGHWAYS IN A REASONABLY SAFE CONDITION FOR PUBLIC TRAVEL: *Town of Gosport v. Evans*, 112 Ind. 133; 2 Am. St. Rep. 164, and cases collected in note 169; *Burrell Tp. v. Uncapher*, 117 Pa. St. 353; 2 Am.

St. Rep. 664, and note 668; *City of Denver v. Dean*, 10 Col. 275, and note 696; *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note; *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep., and note. For liability of cities and towns for defects in their streets and highways, see note in *McCarthy v. Portland*, 24 Am. Rep. 25, 26. For an injury sustained by a traveler on a highway from the falling upon him of some object from an adjacent building, as a sign insecurely fastened, the city is not liable under a statute requiring towns and cities to keep highways in good repair: *Taylor v. Peckham*, 8 R. I. 349; 5 Am. Rep. 578; *Jones v. Boston*, 104 Mass. 75; 6 Am. Rep. 194; *Hewson v. City of New Haven*, 87 Conn. 475; 9 Am. Rep. 342, and note 347. A city given by its charter the care and control of its streets may be liable for an injury to a traveler from an unsafe awning over a sidewalk, although the council has failed to pass any ordinances prohibiting, or providing for the abatement of, such nuisances: *Bohen v. City of Waseca*, 32 Minn. 176; 50 Am. Rep. 564.

ATLANTIC MILLS v. INDIAN ORCHARD MILLS.

[147 MASSACHUSETTS, 202.]

FRAUD.—INNOCENT PERSON CANNOT AVAIL HIMSELF OF AN ADVANTAGE OBTAINED BY THE FRAUD OF ANOTHER unless there is some consideration moving from himself.

KNOWLEDGE OF OFFICER WHEN KNOWLEDGE OF CORPORATION.—If the treasurer of a corporation pays his deficit to it by drawing checks upon another corporation of which he is also treasurer, no other officer of either corporation having knowledge of the true nature of the transaction when it occurred, the knowledge of such treasurer must be imputed to the corporation receiving such checks, and their receipt must be treated as wrongful, and as imposing a liability to repay their amount to the corporation against which they were drawn.

NOTICE OF FRAUD.—PRINCIPAL MUST BE REGARDED AS ACTING WITH KNOWLEDGE OF A FRAUDULENT ACT when he is represented solely by an agent who has such knowledge.

DUTY OF INQUIRY.—CORPORATION RECEIVING FROM ONE OF ITS OFFICERS A LARGE AMOUNT IN CHECKS ON ANOTHER CORPORATION payable to the order of the former, and to be used in discharge of the private debt of the officer to it, is put upon inquiry as to how such officer came by such checks, and to have the right to apply them in satisfaction of his private debt.

PAYMENT, WHAT IS.—MONEY CANNOT BE REGARDED AS RECEIVED IN PAYMENT of a deficit due from a defaulting officer of a corporation when, without any accounting with his principal, such officer secretly transfers such moneys by means of checks drawn on another corporation of which he is also an officer, though he charges himself upon a private memorandum with the moneys so fraudulently withdrawn. The moneys remain the property of the corporation from which they were misappropriated.

ESTOPPEL.—CORPORATION IS NOT ESTOPPED FROM RECOVERING MONEYS FRAUDULENTLY MISAPPLIED BY ITS TREASURER in liquidation of his debt to another corporation by the fact that he fraudulently enters his misappropriation as loans from the wronged corporation to other persons from whom it attempts to collect such supposed loans.

ACTION of contract for the balance due on mutual account between the two corporations. The chief subject of controversy was whether the defendant corporation was entitled to an offset of \$219,114.48. The circumstances relating to this offset were as follows: William Gray, Jr., had been the treasurer of both corporations. Between August, 1881, and August, 1886, he had misappropriated moneys of the plaintiff corporation. Every six months, when the accounts were made up, he had transferred to the plaintiff corporation from the treasury of the other the amount necessary to make his cash accounts good. The transfers were effected by checks drawn on the defendant corporation in favor of the plaintiff, made in the same manner that legitimate transfers of cash from one to the other had been from time to time made and entered in the same manner on the check and stub books of both corporations. The auditor to whom the case was referred ruled in favor of the defendant, and allowed it the set-off claimed.

J. G. Abbott, R. M. Morse, Jr., and C. S. Hamlin, for the plaintiff.

W. G. Russell and G. Putnam, for the defendant.

C. ALLEN, J. The only question in this case is, whether the defendant is entitled to be allowed, by way of set-off, for certain checks amounting to the sum of \$219,114.48, which were fraudulently drawn by Gray on account of the defendant in favor of the plaintiff, as shown in the auditor's report, and transferred to and used for the benefit of the plaintiff.

There is no doubt that there has been an unauthorized transfer of property to this amount from the treasury of the defendant corporation to the treasury of the plaintiff corporation, without any consideration as between the two corporations. It was a fraudulent transfer by Gray, who was the treasurer of both corporations. If this were all there was to it, it would be quite plain that the plaintiff could not in good conscience retain the money. The doctrine is universal, and prevails alike at law and in equity, that a person, though innocent, cannot avail himself of an advantage obtained by the fraud of another, unless there is some consideration moving from himself. It was long ago declared by Lord Mansfield that, "although a third person shall not be punished for the fraud of another, he shall not avail himself of it. There is no case in the law where that can be done": *Robson v. Calze*, 1 Doug. 228; *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532,

545; *Olsted v. Hotailing*, 1 Hill, 317; *Udell v. Atherton*, 7 Hurl. & N. 171; *Huguenin v. Baseley*, 14 Ves. 273; *Scholefield v. Templer*, 4 De Gex & J. 429; *Topham v. Duke of Portland*, 1 De Gex, J. & S. 517, 569; *Russell v. Jackson*, 10 Hare, 204, 212.

The ground on which the plaintiff asserts a right to retain the money is, that Gray had embezzled its funds, as well as the funds of the defendant, to a large amount, and that it is entitled to apply the money thus received from him to reduce his indebtedness for such embezzlements, and treat the same as a payment *pro tanto*; that from the nature of the transaction the law stamps it as a payment, and that thus the plaintiff is a holder of the funds for a valuable consideration. There is no doubt that a thief may use stolen money, or stolen negotiable securities before their maturity, to pay his debts; and in such case, an innocent creditor may retain the payment. But this doctrine is inapplicable to the present case, for two reasons: in the first place, under the circumstances, disclosed in the auditor's report, the plaintiff cannot be considered as an innocent creditor, — that is, a creditor without notice; and moreover, the transaction did not amount to payment.

It is true that no officer of the plaintiff besides Gray knew of the fraudulent origin of these checks; but in the very transaction of receiving them, the plaintiff was represented by Gray, and by him alone, and is bound by his knowledge. It is the same as if the plaintiff's directors had received the checks, knowing what he knew. For the purpose of accepting the checks, Gray stood in the place of the plaintiff, and was the plaintiff. It is quite immaterial, in reference to this question, in what manner or by what officers of the corporation the funds were afterwards used. The important consideration is, how the plaintiff became possessed of the money; and it is apparent that it was through the act of no other person than of Gray himself. It is not as if Gray had stolen the money, and then called the directors of the plaintiff corporation together, and informed them of his indebtedness, and of his desire to make a payment on account, and had then paid over to them the money as money coming from himself, and they had received it without knowledge or suspicion that it had been stolen, and given him credit for it as part payment. There was no transaction whatever between Gray and the plaintiff in respect to the transfer of this money, in which the

plaintiff was represented, either in whole or in part, by other person than by Gray; and therefore, even though transfer to the plaintiff had been made in bank bills or gold coin (which it was not), the plaintiff must be deemed to have had knowledge of the true ownership, because, in receiving the funds, it acted solely through Gray's agency. It cannot be deemed to have known what he knew, and it cannot receive the benefit of his act without accepting the consequences of his knowledge. The plaintiff cannot obtain greater right from his act than if it did the thing itself, knowing what he knew.

Such is the doctrine either expressly declared or necessarily involved in numerous adjudged cases. The leading case in this commonwealth is *Atlantic Bank v. Merchants' Bank*, Gray, 532, where there was the semblance of an account between the guilty agent and other officers of the bank who received the money; but it was held that there was no accounting, and the general principle was held to be applicable. That case was followed by *Skinner v. Merchants' Bank*, 4 Allen, 290, where the facts were similar.

In *Loring v. Brodie*, 134 Mass. 453, 468, one of the numerous questions discussed arose upon the following alleged facts: Brodie, as trustee, held certain trust funds, and as an individual owed the Merchants' Bank. Fuller was cashier of the bank, and was also the agent of Brodie. As such agent, Fuller was in possession of certain moneys belonging to Brodie's trust funds, and wrongfully paid the same, in discharge of Brodie's private indebtedness to the bank, either to himself as cashier of the bank or to the teller, who was under his control. On a bill in equity by the *cestui que trust*, it was declared by the court that, if these facts were proved, the bank must restore the money thus paid; that Fuller's knowledge was the knowledge of the bank, and that the bank could not receive the trust funds except charged with the knowledge which the cashier had, and subject to the responsibility which that involved. But the court found that the proof was not sufficient to establish the facts as charged. And in another part of the same case, on page 458, a similar application of the same general doctrine was made, in holding the bank chargeable with Fuller's knowledge that certain securities pledged by Fuller, as Brodie's agent, to the bank, and received by Fuller as cashier, were trust funds. The court said: "If Fuller was the instrument of Brodie in committing

fraud on the bank by unlawfully transferring to it the securities of another, whether he concealed this fact or not, the bank could not take the securities from his hands or hold them in its custody except with the knowledge he had. The only authority the bank could have to hold or sell them was under the contract made by or through Fuller, its cashier": See also *United States v. State Bank*, 96 U. S. 80; *State Bank v. United States*, 114 Id. 401, 409.

The effect of knowledge is to put the plaintiff in the same position that it would be in if there were no pretense of a consideration moving from it. In order to entitle it to retain the defendant's funds, both elements must exist,—a good consideration, and the want of knowledge that the funds belonged to the defendant. Such want of knowledge cannot in the view of the law exist, where the party in the particular transaction is represented solely by one who has knowledge. The rule is general, that if one who assumes to do an act which will be for the benefit of another commits a fraud in so doing, and the person to whose benefit the fraud will inure seeks, after knowledge of the fraud, to avail himself of that act, and to retain the benefit of it, he must be held to adopt the whole act, fraud and all, and to be chargeable with the knowledge of it, so far at least as relates to his right to retain the benefit so secured. This rule is applied to preferences under insolvent or bankrupt laws, where fraudulent knowledge of the creditor's agent or attorney is imputed to the creditor, though he is personally innocent: *Bush v. Moors*, 133 Mass. 198, 200; *Rogers v. Palmer*, 102 U. S. 263. And for numerous other illustrations of the chargeability of a principal with his agent's knowledge, reference may be made to the following cases: *National Security Bank v. Cushman*, 121 Mass. 490; *Suit v. Woodhall*, 113 Id. 391; *Sartwell v. North*, 144 Id. 188; *Moseley v. Hatch*, 108 Id. 517; *The Distilled Spirits*, 11 Wall. 356; *Doggett v. Emerson*, 3 Story, 700, 735; *New Milford National Bank v. New Milford*, 38 Conn. 98; *Bank of United States v. Davis*, 2 Hill, 451, 464; *Bennett v. Judson*, 21 N. Y. 238; *Crane v. Hunter*, 28 Id. 389; *Glyn v. Baker*, 13 East, 509, 516; *Dresser v. Norwood*, 17 Com. B., N. S., 466; *Boursot v. Savage*, L. R. 2 Eq. 134; *Rolland v. Hart*, L. R. 6 Ch. 678; *Espin v. Pemberton*, 3 De Gex & J. 547; *British and American Telegraph Co. v. Albion Bank*, L. R. 7 Ex. 119; *Bradley v. Riches*, L. R. 9 Ch. Div. 189; *Blackburn v. Vigors*, L. R. 17 Q. B. D. 553, 559; L. R. 12 App. Cas. 531, 537, 538.

We have preferred to put the decision of this point upon the broad ground that if the treasurer of a corporation is a defaulter, and his defalcation is as yet unknown and unsuspected, and he steals money from a third person, and places it with the funds of the corporation in order to conceal and make good his defalcation, and the corporation uses the money as its own, no other officer knowing any of the facts, the corporation does not thereby acquire a good title to the money as against the true owner, but the latter may maintain an action against the corporation to recover back the same. But it is also apparent that in the present case the decision might rest upon a narrower ground. The fraudulent transfers were made by checks of the defendant, payable to the order of the plaintiff, and these checks before being available must necessarily have been indorsed by the plaintiff, acting by some officer authorized to indorse checks payable to its order. If these checks therefore were taken by the plaintiff in payment of indebtedness of Gray, they carried notice upon their face that they were checks of the defendant, not payable to Gray's order, but to the order of the plaintiff. Now, assuming that Gray's transaction had been conducted with some other officers of the plaintiff, who represented that corporation, it is impossible to suppose that they could have accepted these checks in extinguishment of a known indebtedness of Gray to the plaintiff, without being put upon inquiry as to how he came by the defendant's checks to so large an amount, made payable to the plaintiff, which he could apply upon his private account: *National Bank of North America v. Bangs*, 106 Mass: 441, 445, 446; 8 Am. Rep. 349.

Many authorities have been referred to on behalf of the plaintiff which show that an agent's knowledge is not in all cases to be imputed to the principal. As a general thing, they fall within some clear line of distinction from the present case. The most recent of these cases is *Innerarity v. Merchants' Bank*, 139 Mass. 332, 52 Am. Rep. 710, in which Burgess, the fraudulent agent, did not represent the bank in the particular transaction in question, but he was on one side of the transaction as representing himself, and other officers of the bank were on the other side as representing the bank. Under such circumstances, his knowledge of his fraud was not imputed to the bank. That case did not present the question whether a principal can avail himself of the results of his agent's fraud without responsibility for the fraud. So in *Dil-*

fully set forth, it sufficiently appears that, in determining to accept the fraudulent mortgage in question, the plaintiff acted for himself, and innocently, and the supposed agent, who was privy to the fraud, and who advised him to take the mortgage, was not at that stage of the transaction his agent, but was acting in his own interest, and for the mortgagor, and what he did was not for the benefit of the plaintiff, but a fraud upon him. He was not a general agent or solicitor for the plaintiff, but his agency for the plaintiff was limited to completing a transaction which the plaintiff himself had determined to enter upon. In *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, the dissenting opinion goes upon the ground that the examination of the funds in the teller's custody was in fact an accounting by him, in which he, on the one side, represented himself as an accounting officer, and the examining officers, on the other side, represented the bank. This view of the facts did not prevail with a majority of the court, but the principle relied on, even in the dissenting opinion, is entirely consistent with our present decision; while the view of the facts taken by the majority of the court brought that case substantially under the same rule applicable to the present case.

The case of *Ingraham v. Maine Bank*, 18 Mass. 208, is still much relied on, notwithstanding the explanation given in *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, 553, 556, of the ground upon which that decision must rest. In that case, the cashier of the Maine Bank drew official checks as cashier, got the money upon them, and placed the money with the funds of the bank without entering it upon the books; thus the bank received the money raised upon its own checks, which it was bound to pay, and it might well be said that this money was its own under these circumstances. Nobody could claim it by any prior title, unless it were the banks upon which the checks were drawn; and they, instead of seeking to reclaim the money, relied upon and collected the checks which they held. The statement by the court, that "the transaction cannot be distinguished from an actual payment from his own funds to supply the defalcation," does not imply that the bank could, in such case, have held the money, as against the true owner, if he had stolen it from some one else, or that in such case the money would have been its own for all purposes. If such were

the necessary implication from the language used, to that extent the doctrine stated could not be supported.

In the case of *In re European Bank*, L. R. 5 Ch. 858, the decision was placed on the ground that the claim of the Oriental Commercial Bank to the bills in controversy, as having been purchased with their money, was an equity attaching to the bills, and that the Eastern Commercial Bank, having purchased them when overdue, took them subject to this equity. The question respecting which Lord Justice Giffard, in delivering judgment, expressed his opinion, that, under the peculiar circumstances disclosed, the Eastern bank was not affected with notice through Pappa, its sole director, was not material in the decision of the case, and his opinion, whether vindicable or not, is not an authority. The case of *In re Marseilles Ry Co.*, L. R. 7 Ch. 161, stands upon the same ground as *Innerness v. Merchants' Bank*, *supra*.

There is also a class of cases which, perhaps, embraces the case of *In re European Bank*, *supra*, where the act of the assumed agent is not for the benefit of his principal, but where, on the contrary, the agent forms a plan to cheat his principal, and it is held that in that act he does not bear the character of agent, although his position as agent may enable him to carry out his plan. If an agent misuses funds of his principal which are in his hands, and devotes them to private purposes of his own, that is not an act of agency; so if he palms off poor securities of his own upon his absent principal, he conducting both sides of the transaction, it cannot be said, in a proper sense, that in such transaction he represents his principal. The principal is unrepresented. The agent cheats his principal. An embezzler does not represent his principal while in the act of stealing from him, although there is no one else to supervise the transfer of the property. Such cases are *Cave v. Cave*, L. R. 15 Ch. Div. 639; *Kettlewell v. Watson*, L. R. 21 Ch. Div. 685; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158; *Davis Co. v. Davis Co.*, 20 Fed. Rep. 699. They serve to illustrate the position of Gray towards the defendant in drawing the checks in controversy, but do not show that the plaintiff can retain the benefit of them without being chargeable with the knowledge which he possessed.

There is another class of cases where the same person has been trustee of two different funds, and has fraudulently transferred securities from one trust fund to the other. But in each

thing in the nature of an accounting, and the trust fund which has received and has been held entitled to retain the benefit has been partly or wholly represented either by the *cestuis que trust* or by an innocent trustee representing them: *Thorndike v. Hunt*, 3 De Gex & J. 563; *Taylor v. Blakelock*, L. R. 32 Ch. Div. 560; *Case v. James*, 29 Beav. 512; on appeal, 3 De Gex, F. & J. 258. In the last case, the final decision was put specially upon the ground that the surviving trustee himself, who was the sole plaintiff, and sought to follow the trust funds, had been guilty of a breach of trust in wrongfully consenting to a transfer, and that it did not appear that any *cestuis que trust* were interested in the proceeding, and that the trustee himself had no equity for his own benefit to follow the funds.

There is another class of cases, which have been cited for the plaintiff, which rest upon the ground that money, or negotiable securities, transferred to a third person, who receives them innocently as property of the person from whom they come, for a valuable consideration, cannot be followed by the true owner; and the same rule extends to such property received by a firm from one of its members: *Lime Rock Bank v. Plimpton*, 17 Pick. 159; 28 Am. Dec. 286; *Greenfield School District v. First National Bank*, 102 Mass. 174; *Thacher v. Pray*, 118 Mass. 291; 18 Am. Rep. 481; *Ex parte Apsey*, 3 Bro. C. C. 265; *Jaques v. Marquand*, 6 Cow. 497; *Dunlap v. Limes*, 49 Iowa, 177. These cases do not touch the principle upon which the present decision rests.

Thus far the discussion has proceeded upon the assumption that even if the transfer of the defendant's property to the plaintiff were intended as a payment on account of Gray's indebtedness to the plaintiff, yet the plaintiff would not be entitled to hold the same on the ground that it would be chargeable with Gray's knowledge of the source from which the money came. But it is equally clear that the transfer cannot be considered as a payment by Gray to the plaintiff, because it was not so understood or intended by either party. There was no accounting between them. Nobody on the part of the plaintiff called Gray to any account, or knew that he was accounting, or that he was indebted to the plaintiff, or that these funds had come into the plaintiff's possession, or that they had come from Gray. Nobody knew any of these things except Gray himself. Nobody but Gray could possibly have intended that the transaction should amount to a pay-

ment, and his intention, if entertained, was ineffectual because of his fraud. It is not necessary to deny or doubt that Gray might secretly transfer to the treasury of the corporation money or property of his own, and thus, if the same should be kept, extinguish an indebtedness arising from a former embezzlement. There would be nothing fraudulent in the act of such a transfer; and the corporation, being lawfully in possession of the money or property, might properly keep it. But where he undertook in this manner to make a payment by secretly transferring the property of a third person, the act cannot take effect as a payment, because it was not received as such by any person acting on behalf of the plaintiff. There was not even the semblance of an accounting. And under these circumstances, if the plaintiff would adopt the intention to make it a payment, it must also adopt the fraud. It cannot adopt so much of Gray's act as was beneficial, and reject the rest. As Lord Kenyon said in *Smith v. Hodson*, 4 Term Rep. 211, it cannot blow hot and cold. This ground also is fully covered by the decisions in *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, 547-553, and in *Skinner v. Merchants' Bank*, 4 Allen, 290.

It has been further suggested on the part of the plaintiff that there was such a degree of negligence on the part of the defendant as ought to preclude it from maintaining its claim to the funds in controversy. In respect to this, it is sufficient to say that we see no such negligence as ought to have the effect to deprive it of its property.

The fact that Gray, upon a private memorandum, charged himself with the sums fraudulently withdrawn by him is immaterial. This act was unauthorized, and the defendant is not bound by it. Entering it in this manner did not make the transaction a loan from the defendant to Gray. It was none the less a fraudulent taking. The substantial rights of the parties are not affected by the methods of book-keeping adopted by him to conceal his frauds, or by entries made upon private memoranda for the purpose of keeping an account of them. Nor can the plaintiff avoid liability for money which it received without consideration, by showing that Gray fraudulently entered the same upon the defendant's books as loans to other persons, and that the defendant has endeavored to collect the same from those persons. The plaintiff was not misled, and gained no rights thereby: *Commonwealth v. Reading Savings Bank*, 137 Mass. 431; *Holden v. Hoyt*, 134 Id. 181.

The result is, that judgment should be entered according to the report of the auditor.

So ordered.

PRINCIPAL AND AGENT. — **KNOWLEDGE OF AGENT** while acting in the course of his employment is knowledge of his principal: *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543; *Weisser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 731; and this principle applies equally to corporations as well as to natural persons: *Nashville etc. R. R. Co. v. Elliot*, 1 Cold. 611; 78 Am. Dec. 506; *Farmers' Bank v. Payne*, 25 Conn. 444; 68 Am. Dec. 362; note to *Weisser v. Denison*, 61 Id. 739; *Allen v. McCalla*, 96 Id. 64. Principal is not bound by an unauthorized act of his agent amounting to forgery: *King v. Sparks*, 77 Ga. 285; 4 Am. St. Rep. 85.

FRAUD — PRIVITY — FALSE REPRESENTATIONS TO THIRD PERSONS. — Sureties induced to sign a bond by false and fraudulent oral statements to third parties, not intended to come to their knowledge, nor to induce them to sign, are liable on their contract: *Savings Bank v. Albee*, 63 N. H. 152; 56 Am. Rep. 501.

HECHT v. BATCHELLER.

[147 MASSACHUSETTS, 335.]

CONTRACT. — **MISTAKE AS TO THE EXISTENCE OR INDENTITY OF THE SUBJECT-MATTER OF A CONTRACT** is fatal to the contract itself, because of the want of the mutual assent necessary to its creation; but to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality or other collateral attributes is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold.

MISTAKE AS TO THE SOLVENCY OF THE MAKER OF A NOTE SOLD affects its value, and not its identity. Though the maker has made an assignment for the benefit of his creditors, the subject-matter remains the same as before, and the sale is valid.

SALE OF NOTE DOES NOT IMPORT A WARRANTY THAT THE MAKER IS SOLVENT, though such sale is made by a broker, and it is the universal custom of such brokers not to offer for sale the paper of any person whom they have reason to believe to have failed or made an assignment.

CONTRACT for money had and received. The defendants, in the usual course of business, placed a note executed by J. and S. B. Sachs in the hands of a firm of brokers in commercial paper, for sale, and such brokers sold the note to plaintiffs at about one o'clock, P. M., of November 27, 1886. The makers of the note resided and did business at Cincinnati, Ohio, and about two hours prior to its sale they made, pursuant to the laws of said state, an assignment for the benefit of their creditors. Such assignment was entirely unknown both to the brokers and to the plaintiffs and defendants at the time of the sale.

About two hours afterwards it became known, and thereupon the plaintiffs immediately offered to return the note to the defendants, and demanded the return of the money paid therefor. Judgment for plaintiffs. Defendants excepted.

L. D. Brandeis, for the plaintiffs.

T. B. King, for the defendants.

MORTON, C. J. The defendants, being the owners of a promissory note which they had taken in the ordinary course of business, sold it through brokers to the plaintiffs. It was afterwards ascertained that, two hours before this sale, the makers of the note had made a "voluntary assignment of all their assets for the benefit of their creditors, to be administered under the insolvent laws of Ohio," of which state they were residents. Neither of the parties to this suit, nor the brokers employed by the defendants, knew of the assignment at the time of the sale, but they all supposed that the makers were doing business as theretofore. The plaintiffs contend that they are entitled to recover upon either of two grounds: 1. That there was a mutual mistake of the parties as to the thing sold, and therefore no contract was completed between them; and 2. That there was a warranty, expressed or implied, by the defendants, that the makers of the note were then carrying on business, and had not failed or made an assignment.

1. It is a general rule that, where parties assume to contract, and there is a mistake as to the existence or identity of the subject-matter, there is no contract, because of the want of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or if he receives it, may, upon discovery of the mistake, return it, and recover back the price he has paid. But to produce this result, the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold: *Gardner v. Lane*, 9 Allen, 492; 85 Am. Dec. 779; *Gardner v. Lane*, 12 Allen, 89; *Spurr v. Benedict*, 99 Mass. 463; *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Id. 433; Benjamin on Sales, sec. 54.

In the case at bar, the subject-matter of the contract was the note of J. and S. B. Sachs. The note delivered was the same

note which the parties bought and sold. They may both have understood that the makers were solvent, whereas they were insolvent; but such a mistake or misapprehension affects the value of the note, and not its identity: *Day v. Kinney*, 131 Mass. 37. In *Day v. Kinney*, the makers of the note sold were in fact insolvent, but they had not stopped payment or been adjudged insolvent, and the decision is confined to the facts of the case. But we think the same principles apply in this case. The makers of the note had made an assignment for the benefit of their creditors, but this did not extinguish the note, or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject-matter of the sale, but as to its quality. We are therefore of opinion that the sale was valid, and that the plaintiffs cannot recover the amount they paid, as upon a failure of consideration.

2. The other question is one of some difficulty, created in part by the manner in which the case is brought before us. The case was submitted to the superior court upon an agreed statement of facts, "with a right to draw such inferences as a jury might draw therefrom." The court found for the plaintiffs, but upon what ground does not appear. If upon the facts stated, and any inferences of fact which the court might reasonably draw therefrom, its finding can be justified, this court cannot revise its finding: *Old Colony R. R. v. Wilder*, 137 Mass. 536.

When a man sells a note, the law implies a warranty that it is genuine, and that he has such a title as to give him the right and power to sell it: *Lobdell v. Baker*, 1 Met. 193; 35 Am. Dec. 858; *Cabot Bank v. Morton*, 4 Gray, 156; *Merriam v. Walcott*, 3 Allen, 258; 80 Am. Dec. 69. This is upon the ground that the offer of the note is in itself a tacit affirmation or representation that it is genuine, and that the proposed seller has a right to sell it, and from such affirmation the law implies a warranty, which enters into the contract. But it is settled that he does not warrant the solvency of the maker: *Day v. Kinney*, *supra*; *Burgess v. Chapin*, 5 R. L. 225; *Beckwith v. Farnum*, 5 Id. 230. Applying these principles to this case, if the brokers who acted for the defendants at the time of the sale made any express or tacit representations that the

note was a note of a firm then in business, which the parties understood as forming part of the contract, and the plaintiffs relied upon it, it might, in law, amount to a warranty that the note was as they affirmed it to be. But the difficulty of the plaintiffs' case is, that there was no warranty in terms, and there are no facts agreed which justify an inference that the parties intended any such warranty as a part of the contract. The fact that both parties supposed and believed that the makers continued in business is immaterial. In the sale of a horse, both parties may believe the animal is sound; probably in most cases of the sale of notes, both parties believe and understand that the maker is solvent, but no warranty can be implied or inferred from that fact. So the facts that the plaintiffs would not have bought, and the defendants' brokers would not have sold without disclosing the facts to the purchaser, if they had known that the maker had failed, are immaterial.

It is recited in the facts agreed that the transactions of buying and selling commercial paper conducted through brokers "are confined to the paper of persons actually carrying on business." If the statement had stopped here, it might imply that there was a usage of brokers not to sell paper of makers who had failed, and that an intending purchaser had the right to rely upon the offer by the broker of a note for sale as an affirmation that the note offered was the note of a man or firm then in business. But the statement goes on in explanation of its meaning as follows: "In other words, it is the universal custom of such brokers not to offer for sale the paper of any person whom they have reason to believe to have failed or made an assignment." As thus explained, it goes little further than to prove that it is the custom of brokers not to commit a fraud by concealing facts known to them. It does not go far enough to show any usage to warrant the note of any person when the broker has no reason to believe that he has failed.

The plaintiffs rely upon the case of *Harris v. Hanover Bank*, 15 Rep. 390, in which the question here raised was decided in their favor. We think that case is in conflict with the weight of the authorities. In that case the court relies upon the authority of *Roberts v. Fisher*, 43 N. Y. 159, 3 Am. Rep. 680, but that is a case of the payment of a debt by a worthless note. There are cases like *Roberts v. Fisher*, *supra*, where it has been held that if one pays a debt by a worthless note, draft, or

check, the debt is not extinguished: *Small v. Franklin Mining Co.*, 99 Mass. 277; *Weddigen v. Boston Elastic Fabric Co.*, 100 Id. 422. The distinction between such a transaction and the sale of a note in the market is obvious. Where a man offers a note, draft, or check in payment of a bill, unless something is said to the contrary, he offers it as an equivalent for money, and thus tacitly represents that it is as good as money. But the offer of a note for sale, without recourse to the seller, does not involve any representation as to the solvency of the parties to it, or as to its value.

We think the principles we have stated are decisive of the case before us. The defendants sold the note in good faith. So far as the evidence shows, neither party, at the time of the sale, spoke of, or inquired about, or knew anything about, the failure of the makers. They stood upon an equal footing, and they had equal means of knowing the standing of the makers. It was understood that the defendants were selling the note without recourse to them. They did not expressly warrant the value of the note, and we are of the opinion that from the circumstances no warranty could fairly be inferred of the solvency of the makers, or that they continued to do business.

We are therefore of opinion that the first three instructions requested by the defendants should have been given, and that, upon the facts of the case, the court was not justified in finding for the plaintiffs.

Exceptions sustained.

MISTAKE, SUCH AS WILL BE RELIEVED AGAINST, MUST BE MUTUAL: *Benson v. Marboe*, 37 Minn. 30; 5 Am. St. Rep. 816; *Sawyer v. Hovey*, 3 Allen, 391; 81 Am. Dec. 681. For general discussion of avoidance of contracts for mistake, see note to *Miles v. Stevens*, 45 Am. Dec. 631-634. A written instrument, executed by parties between whom there is no fiduciary relation, will not be reformed so as to omit a particular clause, on the ground that it was inserted through the mutual mistake of the parties, when the party against whom the reformation is sought knew of the insertion of the clause at the execution of the instrument, and the party seeking the reformation might have known such fact had he read the instrument: *Metropolitan L. Ass'n v. Eckels*, 75 Cal. 513. The reformation of written instruments, when through mistake they express more or less than was by the contracting parties intended, is a well-established branch of equity jurisdiction: *Franklin v. Jones*, 22 Fla. 526. While it is true that the rule of courts of law is, that written instruments are the best evidence of the intention of the parties, and that the writing, in the contemplation of the courts of law, contains and is the true agreement between the parties, yet courts of equity will, when the promotion of justice demands it, look behind the written instrument itself, and grant relief from a contract entered into or founded upon mistake or fraud: *Schwartz v. Hershey*, 125 Ill. 653.

July, 1888.]

MINOT v. BAKER.

MINOT v. BAKER.

[147 MASSACHUSETTS, 348.]

CHARITABLE TRUST. — GIFT TO ONE OF MONEYS OR PROPERTY DISPOSED OF BY HIM FOR SUCH CHARITABLE PURPOSES as he shall think proper "is a good charitable trust.

CHARITABLE TRUST. — COURT OF EQUITY WILL FRAME A SCHEME TO SET OUT A CHARITABLE TRUST OR BEQUEST upon the death of one to whom property had been devised or bequeathed "to be disposed of by such charitable purposes as he shall think proper."

ADDITIONS OF INTEREST TO THE CAPITAL OF A FUND MUST BE ASSENTED TO BY THE BENEFICIARY HAVE BEEN MADE WITH THE ASSENT OF THE BENEFICIARY for such purposes, when she has received interest on the new capital for a long period of time, never objecting to the additions nor demanding the principal which had been capitalized.

WILL, CONSTRUCTION OF. — WHERE A TESTATOR MADE DEPOSITS IN AN INSURANCE COMPANY, and caused policies to be issued promising M. G. interest, and after her death to pay the amount of the policies to the testator, his successors or administrators, and the testator making his will stated that he had made provision for M. G., and "it is not my wish that any investment which I have made or may hereafter make for her should be disturbed or changed by this will, but that the same shall remain and be disposed of according to the conditions thereof in the same way as though this will had not been made," and then made a general devise of his property to a charitable trust, it was held that the will nevertheless operated upon the policies, and that the amount due thereon (M. G. having in the meantime died) vested in the trustee of the charitable trust, and not in the estate of the testator.

E. M. Johnson, for the plaintiff.

E. H. Bennett, for nieces of the testator.

S. H. Phillips, for the attorney-general.

C. M. Reed, for certain heirs of testator.

G. F. Tucker, for the executor of Maria Gassett.

HOLMES, J. This is a bill for instructions, brought by the executor of the estate of John Percival, administrator *de bonis non* with the will annexed of John Percival. The will appointed John P. Healy executor and gave the residue to Healy, "to be disposed of by him for such charitable purposes as he shall think proper." He died, having disposed of only a small portion of the residue of the estate in his hands for charitable purposes. The first question raised by the report is, Whether the sum of \$14,503.75 received by the plaintiff from the suit upon the bond of Healy as executor of Percival's estate, and from the suit against Healy's administrator, should be paid to the next of kin of the testator.

John Percival, by reason of the failure of said Healy to dispose of the fund in his lifetime for the purposes specified in the residuary clause of the will of said Percival, or should be applied to charitable purposes according to a scheme under the direction of the court.

It is settled that the gift to Healy was a good charitable trust: *White v. Ditson*, 140 Mass. 351, 353; 54 Am. Rep. 473; *Schouler, Petitioner*, 134 Mass. 426; *Saltonstall v. Sanders*, 11 Allen, 446, 453; *Wells v. Doane*, 3 Gray, 201; *Everett v. Carr*, 59 Me. 325; *Pocock v. Attorney-General*, L. R. 3 Ch. Div. 342; *Chapman v. Brown*, 6 Ves. 404, 410; *Dundee v. Morris*, 8 Macq. 134, 158. There was no resulting trust on account of the vagueness of the objects, as there is in cases where the objects are not confined to charities: *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445. The first point to be determined, therefore, is a matter of construction,—whether the limitation to charities was conditional upon Healy's making an appointment, or whether it should be construed as a gift to charitable uses out and out, with a superadded power to Healy to specify them if he saw fit. And on this part of the question we are of opinion that the gift is an unconditional gift to charitable purposes.

There can be little doubt that such would be the construction adopted by the English courts: *Attorney-General v. Fletcher*, L. J. 5 Ch. Cas. 75, 78; *Pocock v. Attorney-General*, *supra*; *Moggridge v. Thackwell*, 7 Ves. 36; 13 Ves. 416; *Mills v. Farmer*, 1 Mer. 55, 100; *White v. White*, 1 Bro. C. C. 12; *Baylis v. Attorney-General*, 2 Atk. 239; *Attorney-General v. Hickman*, 2 Abr. Cas. Eq. 193; *Doyley v. Attorney-General*, 2 Id. 194; *Anonymous*, Freem. Ch. 262 b; *Copinger v. Crehane*, I. R. 11 Eq. 429. Although a different opinion has been intimated in some American cases, at least where there is a naked power not coupled with a trust: *Fontain v. Ravenel*, 17 How. 369, 388, 399; explained and limited by *Russell v. Allen*, 107 U. S. 163, 169. The question must be kept distinct from other questions which do not bear upon the meaning of the words, such as whether a trust for charity generally is valid, or whether a court of equity can and will exercise so general a discretion as is necessary to carry out the trust, etc. If the meaning of the words alone is considered, it appears to be tolerably plain that the English construction is right. The nature of the gift shows that an application of the funds to charity is the dominant object, and that the selection by the

trustee is subordinate, or means to an end. It is not like a gift to a particular charity which fails; there the specific object of bounty or end of the trust may well have furnished the main motive of the testator for giving to charity at all. But to give a power of selection to a party who takes no interest in the fund cannot be supposed to be the main motive of such a trust as we are considering, and the motive of charity goes no further than charity generally, because the testator leaves the rest to his trustee. The testator, in such a case, says, in effect, I give the fund in trust for charitable purposes, and, to save application to the court, I authorize the trustee to determine the scheme.

In the ordinary case of trusts for such persons of a class as the trustee shall select, when a duty to select is imposed upon the trustee by implication, a general intention to benefit the class is recognized, and the trust will not fail if the trustee accepts it and then fails to make a selection: *Brown v. Higgs*, 4 Ves. 708; 5 Id. 495; 8 Id. 561; *Burrough v. Philcox*, 5 Mylne & C. 72; *Penny v. Turner*, 2 Phill. Ch. 403; *Harding v. Glyn*, 1 Atk. 469; *Mahon v. Savage*, 1 Schoales & L. 111; *Spring v. Biles*, 1 Id. 113, note; 1 Term Rep. 435, note; *Salisbury v. Denton*, 3 Kay & J. 529; *Nichols v. Allen*, 130 Mass. 211, 219; 39 Am. Rep. 445; *Drew v. Wakefield*, 54 Me. 291.

Here there is a trust, not a mere power, and it was recognized in *White v. Ditson*, *supra*, that a duty was imposed upon Healy to act, which is a strong circumstance in favor of the construction that the benefit is not intended to be made dependent upon his acting: *Brown v. Higgs*, 8 Ves. 561, 571, 574; *Cole v. Wade*, 16 Id. 27; *Moggridge v. Thackwell*, 7 Id. 36, 82. And it being settled that in some cases you can separate the general intent from the mode of execution, the nature of the gift in the particulars to which we have adverted already seems to us to make the case a stronger one for doing so than where the selection is to be made from relations or the like, as in the decisions cited. At all events, this case is nearer to those than to a gift to such persons as A may appoint: *Mills v. Farmer*, *supra*. For there the limitation is as wide as the world, and if A does not take the beneficial interest, it is impossible to suppose that a gift is intended, unless he exercises the power confided to him. But charitable purposes constitute a well-defined class, to which it is entirely conceivable that a testator should make a gift. We shall consider the validity of such a gift in a moment.

The construction of the will being what we have declared, the question arises whether a trust originally valid is to fail for want of a trustee, contrary to the general doctrine of equity. There is no doubt that if there were a very slight indication of the direction which the testator meant his bounty to take, a court of equity would find itself able to carry out the will. In *Schouler, Petitioner, supra*, the gift was for "charitable purposes, masses," etc., and the court appointed a new trustee. See also *Copinger v. Crehane*, 11 I. R. Eq. 429. But it is argued that when the gift originally is, or through the failure of the first trustee to exercise his discretion afterwards becomes, a gift to charitable uses *simpliciter*, then the disposition of the fund in England was in the king as *parens patriæ*, by the sign manual, and that a court of equity as such has no jurisdiction.

It is to be observed that the objections to the exercise of the power to frame a scheme in the case supposed are not at all similar to those which apply to a diversion by the sign manual to wholly different uses of property devoted to a specific purpose which fails, because contrary to the policy of the law; for instance, as in the well-known case of *Da Costa v. De Pas*, 1 Amb. 228, 2 Swant. 487, note, where a legacy to establish a *Jesuba*, or assembly for reading the law and instructing people in the Jewish religion, was devoted to the foundling hospital for the instruction of the children in the Christian religion. In such a case there is no pretense, or only a pretense, of carrying out the directions of the testator. His will is arbitrarily overridden: *Moggridge v. Thackwell*, 7 Ves. 36, 81. But in a case like the present, whether the machinery used is the sign manual or a scheme prepared under the direction of the court, the testator's wishes are carried out as he has expressed them, just as they might be by the appointment of a trustee, or by the framing of a scheme in those cases where the jurisdiction of the court is admitted.

The only objection on the ground of policy to the court's entertaining jurisdiction which has occurred to us is, that it must choose from too wide a field when there is nothing more specific to guide it than a general direction to apply the fund to charitable purposes. If the objection in this general form were sound, a trust for charitable purposes generally ought to have been held void, whereas all the English cases imply, and express decisions establish, that it is valid: *Nichols v. Allen*, 130 Mass. 211, 221; 39 Am. Rep. 445; *Moggridge v. Thackwell*,

7 Ves. 36, 80; *Paice v. Archbishop of Canterbury*, 14 Id. 864; *Legge v. Asgill*, Turn. & R. 265, note; *Dolan v. Macdermot*, L. R. 3 Ch. 676; *Pocock v. Attorney-General*, L. R. 3 Ch. Div. 342; *Anonymous*, Freem. Ch. 261, case 330 b. It has been said that "the court never, in trust or powers, exercises a discretion": *Felan v. Russell*, 4 I. R. Eq. 701, 704. But the court has never hesitated to frame a scheme, or to make a choice of the individual beneficiary, when the species of charity was indicated: *Baylis v. Attorney-General*, 2 Atk. 239; *White v. White*, 1 Bro. C. C. 12; *Mills v. Farmer*, 1 Mer. 55; 19 Ves. 483; *Attorney-General v. Gladstone*, 13 Sim. 7; *Gillan v. Gillan*, 1 L. R. Ir. 114. And as is pointed out by Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen, 539, 580, a charity being a trust in which the public is interested, and which is allowed by the law to be perpetual, "deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances," etc. Bearing these considerations in mind, and also that under the English practice there would have been no difference in the execution of the trust, whether by the court or by the sign manual (*Moggridge v. Thackwell*, 7 Ves. 36, 87), we think that the court would find no insuperable difficulty in selecting the species as well as the particular object of the charity.

If this be so, the objections remaining to the jurisdiction are purely historical; that it was not exercised in England, and therefore cannot be exercised here; that although in England there was a remedy existing alongside of the ordinary jurisdiction of the chancellor, and practically reaching similar results, yet since this court has not the powers exercised by the sign manual, a will must be defeated, and a trust must fail which this court but for tradition is perfectly competent to carry into effect by machinery which it would have no hesitation in using were the case a hair's breadth different.

If it is possible to avoid such a result, it is desirable to do so, and the historical tradition must be very clear, and the limit of jurisdiction very well defined, to make it necessary that this court should decline for such arbitrary reasons to enforce a trust which it recognizes as valid. It might be hard to escape from the authorities, if no trust were interposed: *Jackson v. Phillips*, 14 Allen, 539, 576. And it is not to be

denied that some courts of authority would probably require a specification of the charity, whether there was a trust or not: *Bristol v. Bristol*, 53 Conn. 242, 256; *Felan v. Russell*, 4 I. R. Eq. 701; Longf. & T. 674; *Clifford v. Francis*, Freem. 830; O'Leary on Religious and Charitable Uses, 183. On the other hand, in *Moggridge v. Thackwell*, 7 Ves. 36, although there were some words of recommendation in the will, not amounting, however, to a limitation of the generality of the trust (7 Id. 85, 86), and although the circumstance that some objects were pointed out was adverted to in the discussion, Lord Eldon did sanction the opinion that if there is or ever has been a trustee, that is enough to warrant the court in framing a scheme, irrespective of the question whether the testator has pointed out any species of charity or not.

In that case Lord Eldon said that he doubted whether, if the decree upon the principles attaching to charitable uses must have called upon the trustees, it could be said that, because the trustee is dead, the court is not to make a decree ordering such direction, for no such order could be given to the king executing by sign manual. And again, in *Paice v. Archbishop of Canterbury*, 14 Ves. 364, 372, he laid it down generally, that when the bequest is to trustees for charitable purposes, the disposition must be the subject of a scheme before the master; but that when the object is charity without a trust interposed, it must be by sign manual: See *Down v. Worrall*, 1 Mylne & K. 561, 563; *Reeve v. Attorney-General*, 3 Hare, 191, 197; *Cook v. Duckenfield*, 2 Atk. 562, 567, decree stated; *Moggridge v. Thackwell*, 7 Ves. 36, 83, 84; Boyle on Charities, 239. In *Anonymous*, Freem. Ch. 261, "it was said, and not denied, that if a man deviseth a sum of money to such charitable uses as he shall direct, by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction, neither by note nor codicil, the court of chancery hath power to dispose of it to such charitable uses as the court shall think fit": *Mills v. Farmer*, 1 Mer. 55, 59, 95.

We do not propose to inquire very curiously whether Lord Eldon's view in the latter case before him is historically accurate or not. It is a view which certainly goes no further than some of the earliest cases, and which it is necessary to adopt in this country to prevent a failure of justice. If we acted with less sanction, we should be conforming to the substantive principles of equity by framing an equitable remedy

where we recognized an equitable right. We are of opinion that the above-mentioned sum of \$14,503.75 should be applied to charitable purposes, according to a scheme under the direction of the court.

Two other questions are raised by the report, and remain to be considered.

During his life, the testator made certain deposits in the Massachusetts Hospital Life Insurance Company, through William Sturgis. The life company issued policies promising to pay Maria Gassett interest "unless added to the principal sum as provided below," and after her death, to pay the amount of the principal sum to Captain Percival, his executors or administrators. The provision in the policy referred to allowed Mrs. Gassett to have the annual "payments added to the principal sum (in order to increase said principal sum)," giving the company sixty days' notice. Interest was capitalized annually by the company on these policies, from their dates in 1851 and 1852 through January 1, 1863, and the amount of the interest and the former capital added was indorsed on the policy, under the head, "New capital, being the principal sum with the successive accumulations of interest." It is alleged, and admitted in the pleadings, that this was done at Mrs. Gassett's election, and in pursuance of the agreement in the policies. An express direction on her part was not proved; but it appears that Mrs. Gassett received interest on the new capital for over twenty years, until her death, and never objected to the additions or demanded the interest which had been capitalized.

Captain Percival, by his will, stated that he had made provision for Mrs. Gassett, and proceeded: "It is not my wish that any investment which I have made or hereafter may make for her should be disturbed or changed by this will, but I direct that the sum shall remain and be disposed of according to the conditions thereof, in the same way as though this will had not been made. I advise," etc. Mrs. Gassett died in 1887. The plaintiff has collected the amount due on the policies, and the further questions raised are, whether these amounts are to go to the next of kin as if the will had not been made, or go to charity as part of the residue; and also whether Mrs. Gassett's executor is entitled to a portion of the sums collected equal to the amount of interest added to the original capital as we have described.

On the former question it is argued that the testator meant,

by the language which we have quoted, to withdraw the whole investment in the Hospital Life Company from the operation of his will. If that was not his intention, the clause has no effect, since, of course, Captain Percival could not disturb by his will Mrs. Gassett's vested life interest under the policies. But the words used apply to "any investment" which the testator may make in the future, as well as to those which he has made in the past, and they apply only to investments "for her," and to nothing else. We cannot limit their meaning to a specific reference to the investments in the Hospital Life Company as a whole, nor extend it beyond Mrs. Gassett's interest, whatever it may turn out to be in this or that particular fund. We are constrained to hold that Captain Percival's interest in the policies is not excepted from the operation of his will, but is a part of the estate disposed of by it, and must be applied to charitable purposes.

On the last question, as the pleadings stand, and apart from the pleadings in view of Mrs. Gassett's course of conduct while alive, we must assume that the additions of interest to capital were made with her consent, as recommended by Captain Percival in his will, and we must take the additions to have been made absolutely and for all purposes, so that her executor has no claim, but the principal fund as increased goes under the policies to the administrator of Captain Percival, to whom the company paid it: See *In re Curteis's Trusts*, L. R. 14 Eq. 217.

Decree accordingly.

CHARITABLE TRUST. — GIFTS AND TRUSTS FOR CHARITABLE PURPOSES are most liberally construed; the trustee need not be known, nor capable of taking, nor need the beneficiary or objects of the trust be definite: *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142, and note 152; *Bridges v. Pleasants*, 4 Ired. Eq. 26; 44 Am. Dec. 94, and extended note 93-101. For devises and bequests to charitable uses, when and when not void for uncertainty: *Howe v. Wilson*, 91 Mo. 45; 60 Am. Rep. 226, and note 230, where the subject is discussed somewhat at length; *Eutaw Place etc. Church v. Shively*, 67 Md. 493; 1 Am. St. Rep. 412, and note 415, 416. A bequest of a fund to trustees "to appropriate the principal and interest, as they shall deem proper, to aid such indigent, needy, and meritorious widows and orphans of the town of W. as may need temporary help to keep them from being chargeable to the town as paupers, leaving to the trustees' discretion as to who shall be made the subjects of such aid," is a valid charitable trust: *Camp v. Crocker*, 54 Conn. 21. A gift "to aid indigent young men in fitting themselves for the evangelical ministry" is a good charitable use, and not void for uncertainty: *Trustees of School v. Whitney*, 54 Conn. 342.

CHARITABLE TRUSTS. — EQUITY HAS THE POWER TO APPLY THE DOCTRINE OF CY-PRES TO CHARITIES, and a gift will not be permitted by equity to fail because of the non-incorporation of the society to whom and for whose

benefit the conveyance was made: *Missouri H. Society v. Academy of Science*, 94 Mo. 459. A court of equity never wants a trustee, and when property has been bequeathed in trust, and the trustee appointed refuses to take, the court will decree the execution of the trust by the personal representative, who is deemed the trustee, that is, if the trust estate is personalty: *Tucker v. Grundy*, 83 Ky. 540. Where property is conveyed to trustees who are incapable of taking the title thereto for the benefit and use of a county, equity will not suffer the conveyance to be defeated by any lack of capacity or authority on the part of the trustees to take and hold the property for the county: *Skipwith v. Martin*, 50 Ark. 141.

COOPER v. COOPER.

[147 MASSACHUSETTS, 870.]

WHILE PARTIES LIVE TOGETHER AS HUSBAND AND WIFE, NO IMPLIED PROMISE CAN ARISE that the one will pay for work done by the other. **WOMAN DECEIVED INTO THE BELIEF THAT SHE IS MARRIED CANNOT SUSTAIN AN ACTION FOR SERVICES** rendered by her as housekeeper for her supposed husband while living with him as his wife, and in ignorance that her marriage to him was void because the wife of a prior marriage was still living. If she has any remedy, it is by an action for the deceit in inducing her to marry by false representations or by false promises.

ACTION of contract against the administrators of the estate of James W. Cooper. . The plaintiff, to sustain her action, proved that she and the decedent, in January, 1869, went through the form of marriage, and thereafter until his death lived together as husband and wife; that she kept house for him until he died, and never received anything for her services; that during a portion of the time she kept boarders, and gave the profits, amounting to a sum which she stated, to the decedent; that before the marriage decedent told her that he had been previously married, but that he was divorced from his wife. The plaintiff did not discover that the former wife was living until after the death of the decedent, in July, 1885. The court decided that the evidence failed to disclose any express contract to pay for plaintiff's services, and that no implied contract could arise while the parties lived together as husband and wife, and directed a verdict to be entered for the defendants.

S. B. Allen, for the plaintiff.

W. B. French, for the defendants.

W. ALLEN, J. The plaintiff and James W. Cooper intermarried in the year 1869, and lived together as husband and

wife until his death, in 1885. After his death, the plaintiff learned that a former wife, from whom he had not been divorced, was living, and brought this action of contract against his administrator to recover for work and labor performed by her as housekeeper while living with the intestate. The court correctly ruled that when the parties lived together as husband and wife there could be no implied promise by the husband to pay for such work. The legal relations of the parties did not forbid an express contract between them; but their actual relations, and the circumstances under which the work was performed, negatived any implication of an agreement or promise that it should be paid for: *Robbins v. Potter*, 11 Allen, 588; 98 Mass. 582.

The case at bar cannot be distinguished from that cited, unless upon the grounds that the plaintiff believed that her marriage was legal, and that the intestate induced her to marry him by falsely representing that he had been divorced from his former wife. But the fact that the plaintiff was led by mistake or deceit into assuming the relation of a wife has no tendency to show that she did not act in that relation; and the fact that she believed herself to be a wife excludes the inference that the society and assistance of a wife which she gave to her supposed husband were for hire. It shows that her intention in keeping his house was to act as a wife and mistress of a family, and not as a hired servant. There was clearly no obligation to pay wages arising from contract; and the plaintiff's case is rested on the ground that there was an obligation or duty imposed by law, from which the law raises a promise to pay money, upon which the action can be sustained.

The plaintiff's remedy was by an action of tort for the deceit in inducing her to marry him by false representations, or by a false promise: *Blossom v. Barrett*, 37 N. Y. 484; 97 Am. Dec. 747. The injury which was sustained by her was in being led by the promise, or the deceit, to give the fellowship and assistance of a wife to one who was not her husband, and to assume and act in a relation and condition that proved to be false and ignominious. The duty which the intestate owed to her was to make recompense for the wrong which he had done to her. It is said that from this duty the law raised a promise to pay her money for the work performed by her in housekeeping. The obligation to make compensation for the breach of contract could be enforced only in an action upon the contract. The obligation to make recompense for the

injury done by the tort was imposed by law, and could be enforced only in an action of tort; it was not a debt or duty upon which the law raised a promise which would support an action of contract. The same act or transaction may constitute a cause of action both in contract and in tort, and a party may have an election to pursue either remedy. In that sense, he may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which *assumpsit* can be maintained: *Jones v. Hoar*, 5 Pick. 285; *Brown v. Holbrook*, 4 Gray, 102; *Ferguson v. Carrington*, 9 Barn. & C. 59; see also Metcalf on Contracts, 9, 10; 1 Chitty on Contracts, 11th Am. ed., 87; *Earle v. Coburn*, 130 Mass. 596; *Milford v. Commonwealth*, 144 Id. 64.

But the objection to maintaining the plaintiff's action lies deeper. The work and labor never constituted a cause of action in tort. The plaintiff could have maintained no action of tort against the intestate for withholding payment for the work and labor in housekeeping, or for, by false representations, inducing her to perform the work without pay. The particular acts which she performed as a wife were not induced by the deceit, so that each would constitute a substantive cause of action, but by the position which she was deceived into assuming, and would be elements of damage in an action for that deceit. Labor in housekeeping was a small incident to a great wrong, and the intestate owed no duty, and had no right to single that out and offer payment for it alone; and the offer to do so might well have been deemed an aggravation of the injury to the plaintiff.

We have been referred to *Higgins v. Breen*, 9 Mo. 493, and *Fox v. Dawson*, 8 Mart. (La.) 94, as decisions contrary to the conclusion which we have reached. It does not appear upon what ground the latter case was decided. The former was decided in favor of the defendant, the administrator, upon technical grounds; but the question of his liability was considered. It was assumed that an action of contract could have been maintained against the intestate for work and labor; and the question discussed was, whether the action would survive against his administrator, and it was held that it would. Upon the evidence in the present case, we think that no action, certainly no action of contract for the cause of action declared on, could have been maintained against the

intestate. Even if the intestate had been liable in tort, we are not prepared to assent to the proposition that an action of contract will lie against an administrator for a tort of his intestate for which no action of contract could have been sustained against him.

In the opinion of a majority of the court, the entry must be, exceptions overruled.

HUSBAND AND WIFE. — A WIFE MAY RECOVER FOR SERVICES in taking care of her blind father-in-law, residing in the family of herself and husband, in pursuance of an arrangement or understanding to that effect with the father-in-law, fairly made, and assented to by the husband: *Mason v. Dwyer*, 43 Mich. 407; 38 Am. Rep. 201.

WRIGHT v. DAWSON.

[147 MASSACHUSETTS, 384.]

RECEIPTOR OF ATTACHED PROPERTY MAY EXONERATE HIMSELF FROM LIABILITY by proving any state of facts which shows that the officer is not under any liability either to apply the property to the debt of the attaching creditor, or to return it to the debtor or other owner.

RECEIPTOR OF ATTACHED PROPERTY IS NOT LIABLE THEREFOR IF HE PERMITS IT TO RETURN to the custody of the defendant in attachment, who within less than four months after the levy of the writ files his petition in insolvency, and the property is received by his assignee and its proceeds applied to the benefit of his creditors.

CONTRACT against the defendant as a receiptor of certain personal property attached by the plaintiff, Wright, who was a deputy sheriff. The writ of attachment was against one Parsons, and was levied on the 14th of April, 1880. On the 16th of the same month the defendant gave his receipt to the plaintiff for such property, whereby he agreed to keep the property safely, to redeliver it on demand, or if no demand should be made, to redeliver it within thirty days after the rendering of judgment in the action against Parsons. The defendant permitted the property to go back into the hands of Parsons, who, upon August 9, 1880, filed a voluntary petition in insolvency, and was adjudged an insolvent. The property was taken by the messenger in insolvency and delivered to the assignee, who disposed of it for the benefit of the insolvent's creditors. April 19, 1887, judgment was recovered in the action against Parsons, and within thirty days thereafter, execution was placed in the hands of the plaintiff. The judge ruled that the action could not be sustained. Plaintiff excepted.

J. A. Wainwright, for the plaintiff.

D. W. Bond, for the defendant.

MORTON, C. J. This is an action upon a receipt given by the defendant to the plaintiff, who as a deputy sheriff had attached certain personal property owned by one Parsons on a writ against him. By the receipt, the defendant undertakes to keep the property safely, and to redeliver it to the plaintiff on demand, and if no demand, to redeliver it within thirty days of the rendering of judgment in the suit against Parsons, so that the same may be taken on execution.

It is settled that under such a receipt the receiptor is not under an absolute liability to redeliver the property; but it may be stated as a general rule, that he is entitled to prove as an excuse for not delivering it, and as a defense to an action upon the receipt, any state of facts which shows that the officer is not under any liability either to apply the property to the debt of the attaching creditor, or to return it to the debtor or other owner. Thus he may show as a defense that the property has been taken from him by the real owner by virtue of a paramount title: *Learned v. Bryant*, 13 Mass. 224; *Denny v. Willard*, 11 Pick. 519; 22 Am. Dec. 389. Or that it was exempt from attachment, and has been given up to the debtor: *Thayer v. Hunt*, 2 Allen, 449. Or that the attachment was dissolved by the insolvency of the debtor: *Sprague v. Wheatland*, 3 Met. 416; *Grant v. Lyman*, 4 Id. 470; *Andrews v. Southwick*, 13 Id. 535; *Butterfield v. Converse*, 10 Cush. 317; *Shumway v. Carpenter*, 13 Allen, 68; *Lewis v. Webber*, 116 Mass. 450. These cases proceed upon the ground that the liability of the receiptor is of a peculiar character; he is a mere bailee of the officer, who can enforce the promise of his bailor to deliver the goods only so far as is necessary to relieve himself from liability to any party interested in the attachment.

Applying these principles to the case at bar, it is clear that the plaintiff cannot maintain his action. He is not liable over to any person for the property. He is not liable to the debtor, for the property has been applied to his use in the payment of his debts; nor to the assignee in insolvency, because he has received the property and disposed of it for the benefit of the creditors of the judgment debtor. He is not liable to the attaching creditor, because he had no right to take the property and apply it to his own debt, thus gaining a preference over

the other creditors of the debtor. The debtor filed his petition in insolvency within four months after the attachment; the effect of this was to dissolve the attachment, if any existed, and take away the right of the creditor to have this property applied to his debt.

The plaintiff contends that as the receiptor allowed the property to go back into the hands of the debtor before the insolvency proceedings, the attachment was thereby dissolved, so that the insolvency proceedings did not operate upon it. It is not necessary to decide whether this act of the receiptor operated to discharge the attachment for all purposes, because upon the facts of this case it is immaterial. The ground upon which an officer is liable is, that he has been negligent in keeping the property, and that the attaching creditor has thereby sustained injury: *Grant v. Lyman*, 4 Met. 470. But if we assume that the act of the receiptor discharged the attachment before the insolvency, yet the creditor was not in any way injured by such act. Whether the attachment was discharged or not, the property lawfully belonged to the assignee, and he has received it, and rightfully applied it to the benefit of the general creditors of the debtor. The attaching creditors has sustained no injury by the act of the receiptor, and cannot, by a suit in the name of the officer, hold him liable.

It follows that the superior court rightly ruled that upon the facts proved, this action could not be maintained.

Exceptions overruled.

ATTACHMENT. — IF ONE HAS RECEIPTED FOR ATTACHED PROPERTY, AND ALLOWED IT TO GO BACK INTO OR REMAIN IN THE HANDS OF THE DEBTOR, AND THE LATTER SELLS IT, THE RECEIPTOR IS LIABLE. Having intrusted the property to the debtor, he will be responsible for the debtor's acts: *Waitt v. Thompson*, 43 N. H. 161; 80 Am. Dec. 136.

ATTACHMENT — FORTHCOMING BOND. — A SURETY ON A BOND TO RELEASE ATTACHED GOODS IS DISCHARGED BY THE INSOLVENCY OF THE DEFENDANT AND AN ASSIGNMENT OVER FOR THE BENEFIT OF HIS CREDITORS: *Keyes v. Shannon*, 8 Rob. (La.) 172; 41 Am. Dec. 299.

ATTACHMENT — ESTOPPEL. — A PERSON IN WHOSE POSSESSION ATTACHED PROPERTY IS FOUND IS NOT, BY THE MERE EXECUTION OF A FORTHCOMING BOND, ESTOPPED FROM ASSERTING HIS CLAIM TO THE PROPERTY BY INTERPLEA FILED IN APT TIME, AND HE MAY MAKE HIS CLAIM WITHOUT FIRST SURRENDERING THE PROPERTY TO THE OFFICER HOLDING THE ATTACHMENT: *Applewhite v. Harrell M. Co.*, 49 Ark. 279.

CHATHAM FURNACE COMPANY v. MOFFATT.

[147 MASSACHUSETTS, 408.]

IN ACTIONS OF DECEIT, THE CHARGE OF FRAUDULENT INTENT IS MAINTAINED by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud exists in stating that the party knows the thing to exist when he does not know it to exist, and if he does not know it to exist, he must ordinarily be deemed to know that he does not.

FALSE REPRESENTATIONS. — DEFENDANT WHO REPRESENTS THAT A CERTAIN ORE-BED IS WITHIN THE LIMITS OF A MINE, the lease of which he is seeking to sell, is liable to a purchaser who has acted upon such representations, if it appears that the only reason defendant had for his representations was a plan of a survey of the mine, in which a certain line dividing the mine from another was, at the suggestion of the defendant and without verification, assumed to run in a particular direction, which would include the ore-bed, when in fact it ran in a different direction, and one which left the ore-bed outside the mine, concerning which the representation was made.

TORT for false and fraudulent representations: Judgment for the plaintiff.

H. L. Dawes and T. P. Pingree, for the plaintiff.

M. Wilcox and E. M. Wood, for the defendant.

C. ALLEN, J. It is well settled in this commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this commonwealth, and rests alike on sound policy and on sound legal principles: *Cole v. Cassidy*, 138 Mass. 437; 52 Am. Rep. 284; *Savage v. Stevens*, 126 Id. 207; *Tucker v. White*, 125 Id. 344; *Litchfield v. Hutchinson*, 117 Id. 195; *Milliken v. Thorndike*, 103 Id. 882; *Fisher v. Mellen*, 103 Id. 503; *Stone v. Denny*, 4 Met. 151; *Page v. Bent*, 2 Id. 871; *Hazard v. Irwin*, 18 Pick. 95. And though this

doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, amongst others: *Cooper v. Schlesinger*, 111 U. S. 148; *Bower v. Fenn*, 90 Pa. St. 359; 85 Am. Rep. 662; *Brownlie v. Campbell*, 5 App. Cas. 925, 953, by Lord Blackburn; *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 64, 79, 80, by Lord Cairns; *Slim v. Croucher*, 1 De Gex, F. & J. 518, by Lord Campbell; see also *Peck v. Derry*, 59 L. T., N. S., 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and *débris*. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from eight thousand to ten thousand tons, in his ore-bed, uncovered and ready to be taken out, and visible when the bed was free from water and *débris*. The material point was, whether this mass of iron ore, which did in truth exist underground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore-bed; and the representations were not in fact true, in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy these representations if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption, the survey was misleading, the iron ore being in

fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore-bed, that is, within his boundaries; and in support of this assertion, he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now, this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore-bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of *Milliken v. Thorndike*, 103 Mass. 382, bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and in reply to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice Colt, that the representation "was of a fact the existence of which was not open and visible, of which the plaintiff [the lessor] had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."

In respect to the rule of damages, the defendant does not in argument contend that the general rule adopted by the judge was incorrect, but that it does not sufficiently appear what considerations entered into his estimate. No requests for rulings upon this subject were made, and there was no error in the course pursued by the judge.

Exceptions overruled

FRAUD — FALSE REPRESENTATIONS. — WHAT REPRESENTATIONS AVOID CONTRACT: *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717; *Cle Newcastle etc. R. R. Co.*, 9 Ind. 488; 68 Am. Dec. 653, and notes to these cases; *Barnard v. R. Iron Co.*, 85 Tenn. 139; *Runge v. Brown*, 23 Neb.

FRAUD. — REPRESENTATIONS RESPECTING FUTURE EVENTS, OR THINGS TO BE DONE AT A FUTURE TIME, cannot be true or false when made, but cannot be enforced unless they amount to a contract: *Knowlton v. Kee* 146 Mass. 86; 4 Am. St. Rep. 282; nor can such representations create estoppel: *McLain v. Bullner*, 49 Ark. 218; 4 Am. St. Rep. 36, and note. As to whether false representations as to future events will vitiate a contract: *Henderson v. San Antonio etc. R. R.*, 17 Tex. 560; 67 Am. Dec. and note 685. Fraud must relate to facts then existing or which had previously existed: *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202, and note.

FRAUD. — ILLEGAL ACTS PREJUDICIAL TO THE RIGHTS OF OTHERS. FRAUDS ON THOSE RIGHTS, although the parties are innocent of any intention to commit a fraud. If the act is in effect a fraud, the motives of the parties are of no consequence: *Logan v. Logan*, 22 Fla. 561; 1 Am. St. R. 212.

FALSE REPRESENTATIONS AS TO MATTERS MATERIAL TO A CONTRACT and upon which the party to whom they are made relies to his damage, constitute a defense to an action upon the contract, although their falsity was unknown to the party making them: *Fraser v. Miller*, 37 Ind. 1; 10 Am. St. Rep. 62; *Alvarez v. Brannon*, 7 Cal. 503; 68 Am. Dec. 274; *Woodruff v. Garrison* 27 Ind. 4; 89 Am. Dec. 477. To constitute a transaction fraudulent, there must be a willful misrepresentation of facts, or the suppression of such facts as honesty and good faith require to be disclosed: *Mitchell v. Deeds*, 49 Cal. 416; 95 Am. Dec. 621; and the representation must be of a fact, and not an expression of opinion, must be false to a material extent, and must be made under such circumstances that a party has a right to rely on it, and it must be relied upon: *Jenkins v. Long*, 19 Ind. 23; 81 Am. Dec. 374.

KELLY v. INHABITANTS OF BLACKSTONE.

[147 MASSACHUSETTS, 443.]

EXERCISE OF DUE CARE BY TRAVELER IS NOT INCONSISTENT WITH A MOMENTARY DIVERSION OF HIS ATTENTION from a defect in a highway of which he had previous knowledge. Hence when an old lady walking in the dark, on hearing other persons approaching on the same side of the road, crossed to the other side, where she knew a bad place or defect existed, into which she fell because she was not then thinking of the road, it was held that it was for the jury to determine, from all the circumstances of the case, whether she had conducted herself with the care and circumspection which ought reasonably to have been exercised by her as a traveler.

TORT for personal injuries suffered by plaintiff by the way of a railing at the side of a highway. The plaintiff was sixty

In the latter part of November, 1886, after it had become quite dark, she started to return from her daughter's to her own home. Upon the east side of the way was an unguarded footpath about eighteen inches wide. From this path another footpath extended down a slope or incline, and was so worn by travel and the wash of water that at a point where it intersected the path beside the way there was a hole extending into the path for half its width. The plaintiff thought she heard the footsteps of persons approaching on the west side of the way. She therefore crossed to the east side, and after taking a few steps, fell into a hole or washout at the roadside, and rolled down the slope, suffering the injuries for which she sought compensation in this action. She knew that the bad place existed in the path on the east side, but at the time she fell, did not think about and was not looking for it, and her only reason for crossing over to the east side was because she heard persons coming on the west side, and desired to avoid meeting them. The defendants requested the judge to charge that there was no evidence of due care on the part of the plaintiff. This request was refused. The jury returned a verdict for plaintiff, and the defendant excepted.

T. G. Kent and G. T. Dewey, for the plaintiff.

J. Hopkins and F. N. Thayer, for the defendant.

DEVENS, J. The only question presented by the exceptions is, whether there was sufficient evidence of due care on the part of the plaintiff to be submitted to the jury.

The plaintiff was walking on the east side of the highway, where there was a path about eighteen inches wide, suitable for travelers on foot, and at a slow or moderate pace. From this path another path descended the slope of the embankment from top to bottom, a distance of about sixteen feet; the travel down this latter path and the wash of water had so worn it that at its upper end it extended into and cut the path along the side of the way one half its width, creating a hole, as the plaintiff testified, into which she fell, and thence rolled down the slope. It was early in the evening, but quite dark, and the plaintiff was returning from her daughter's house, which was on the west side of the highway, to her own, which was on the easterly side. She did not usually walk on this side of the road, and had not done so in going to her daughter's house, being in the habit of crossing the highway, both going and returning, near her own house. On the evening of the

accident, she crossed to the easterly side of the road, as she states, because she heard persons approaching on the west side of the road. She knew that there was a bad place made on the east side by the intersection of the path on that side with the path which descended the slope. Her testimony, which is all there was as to her knowledge of this defect, was given at great length in her cross-examination, which is fully reported, and is somewhat confused and confusing as to the extent of her knowledge of its exact character.

It certainly does not clearly appear thereby that she knew there was at that point "a washout at the side of the road," or "a hole," which are the terms she used in describing the place into which she fell. Nor even if she had full knowledge of the exact character of the defect, would it necessarily follow that she failed in the exercise of due care because she crossed to the easterly side of the road to avoid meeting strangers after nightfall, or because, as she states, she was not thinking about the road when she fell. A traveler may have his attention momentarily diverted from the defects in the way, even if known to him, and yet be in the exercise of due care.

In *Weare v. Fitchburg*, 110 Mass. 834, the plaintiff was called suddenly home from the house of a neighbor, where she was visiting, to attend her children, and running along a footpath, struck against a large stone which she knew to be therein, but of which she was not thinking at the time; and it was held that this was not conclusive evidence that she was careless, and that whether she was so or not was, under all the circumstances, to be decided by the jury.

In a similar way, in the case at bar, the anxiety which the plaintiff might have had, in view of her age and her timidity, as to the approaching strangers, together with the darkness of the night, the pace at which she was walking, and her knowledge of the defect, whether more or less, as it may have been found to be, were all to be considered in determining whether she had conducted herself with that care and circumspection which ought reasonably to have been exercised by her as a traveler, and the question was properly submitted to the jury: *Reed v. Northfield*, 18 Pick. 94; 23 Am. Dec. 662; *George v. Haverhill*, 110 Mass. 506, 513; *Barton v. Springfield*, 110 Id. 181; *Dewire v. Bailey*, 181 Id. 169, 170; 41 Am. Rep. 219.

The defendant considers the case of *Gilman v. Deerfield*, 15 Gray, 577, to be decisive in its favor. But in that case, as remarked by Mr. Justice Colt in *Weare v. Fitchburg*, *supra*,

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“the court declared that it was impossible to find on the facts reported that the plaintiff took the least possible degree of care to preserve or protect himself from the peril to which he was exposed, and that his testimony not only wholly failed to show that there was the exercise of the degree of care which men of ordinary prudence use, but was equivalent to a positive declaration that he was utterly incautious, and took no care of himself whatever.” In this view, the case at bar is clearly distinguishable from it.

Exceptions overruled.

NEGLIGENCE IS, IN LAW, A RELATIVE TERM, AND IMPLIES the non-observance of or the omission to perform a duty which is prescribed by law or it arises from the situation of the parties and the circumstances surrounding the transaction: *Kelley v. Michigan etc. R. R. Co.*, 65 Mich. 186; 8 Am. St. Rep. 876, and note. Negligence is a relative term, and its application depends upon the situation of the parties, and the degree of care and diligence which the circumstances usually impose: *Hayes v. Gainesville Street R. Co.*, 70 Tex. 602; 8 Am. St. Rep. 624. The rule is not universal that a defendant is excused from liability merely because the plaintiff, knowing of the danger caused by the defendant's negligence, voluntarily incurs it. If a defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, or if, by the defendant's negligence, plaintiff is placed in a situation of peril, to escape which he voluntarily incurs and danger, the defendant is liable, although the plaintiff may not in the emergency have pursued the course which ordinary prudence would have dictated: *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842. Reasonable care is proportioned to the danger to be guarded against: *Dexter v. Cready*, 54 Conn. 171.

SCANLON v. BOSTON AND ALBANY R. R. Co.

[147 MASSACHUSETTS, 434.]

EMPLOYEE DOES NOT ASSUME RISK OF PERIL FROM DANGEROUS MACHINERY, APPLIANCES, OR STRUCTURES, unless he knows of the danger, or it is so obvious that he must be presumed to know it.

RAILROAD CORPORATION IS LIABLE TO A BRAKEMAN INJURED BY A SIGN POST PLACED so near the track that it knocked him off of a ladder on the side of a freight-car on which he was climbing, in the discharge of his duty, when he was unfamiliar with the road, and had not been informed of the existence of permanent structures so near the track as to make it dangerous to be in the place at which he was when hurt.

TORT for personal injuries. Plaintiff was employed as a brakeman by the defendant corporation, and, in the performance of his duty, was climbing a ladder on the outside of a freight-car. While in this position, he was struck by a sign post and knocked from the car. The post was about

inches square, fifteen feet high, and within one foot of the ladder from which plaintiff was knocked. He had no previous knowledge of the height of this post, or its proximity to the track, and no directions were given him by any person in regard to the car or the obstructions on the road. He was merely told to keep near the brakeman at the head of the car, and he would find what to do. The defendant requested the judge to rule that the plaintiff could not recover, because the danger from which he had suffered was incident to the employment he had taken upon himself. The judge ruled accordingly, and directed a verdict for the defendant.

W. S. B. Hopkins, for the plaintiff.

F. P. Goulding, for the defendant.

W. ALLEN, J. The danger, the risk of injury, which it is claimed that the plaintiff assumed, was not the particular danger from the post which caused the injury, but the general danger from the structures and erections near the track. The plaintiff had no actual knowledge of the danger, and he cannot be held to have assumed the risk of it unless the character of the danger and the circumstances are such as to show that he ought to have known and appreciated it. The fact that it was incident to the employment is not sufficient; peril from dangerous machinery or appliances or structures is incident to employment upon them, but the risk is not assumed by the employee unless he knows the danger, or unless it is so obviously incident that he will be presumed to know it. The danger in this case was not from objects casually or accidentally near the side of the car, but from permanent erections maintained near the track by the defendant. The circumstances are not such that the plaintiff will be presumed to, or ought to, have known of the danger. He did not know that there were erections so near the track as to endanger him. Such erections were, in fact, few and exceptional. Within fifteen miles of Boston there were but seven,—three signal-posts, one telegraph-pole, and three bridges and abutments; it does not appear whether there were any others upon the road. It was the plaintiff's first trip as brakeman; he was unfamiliar with the road and with the running of trains, and was not informed that there was any such danger, or in any way cautioned in regard to it; and he had no reason to know that there were permanent erections so near the tracks as to

make it dangerous for him to be upon the place on the car which was provided by the defendant.

The case of *Lovejoy v. Boston etc. R. R. Co.*, 125 Mass. 79, 28 Am. Rep. 206, was, in some respects, very similar to this. An engineer, leaning out from the cab of his engine, was struck by a signal-post. The post was one of a series equally distant from the track; the abutments of forty-six bridges, and numerous buildings, station entrances, and other structures on the line of the railroad were as near to the track, and these facts were known to the plaintiff. The court say: "If there was any danger to the plaintiff, while in the performance of his duty, from the structures thus placed, it was a risk he had assumed. He knew the manner in which the road was constructed, the proximity to the track of these structures, and the methods employed in the management of the trains. The defendant had the right to construct its road and conduct its business in this manner, and as was said in *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412, 20 Am. Rep. 831, is not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom."

In *Yeaton v. Boston etc. R. R. Co.*, 135 Mass. 418, the plaintiff was employed upon a switching-engine, which was used to move cars about the defendant's yard, and part of the plaintiff's business was to move damaged cars, and he knew the danger that attended handling them, and sometimes examined cars to see if they were damaged. The court held that the defendant was not bound to give notice to the plaintiff that a particular car which was in the yard to be moved was defective, but that the plaintiff took the risk of ascertaining that fact.

In the case at bar, it was the general danger from permanent structures of which the defendant failed to give notice.

Leary v. Boston etc. R. R. Co., 139 Mass. 580, 52 Am. Rep. 733, was the case of a fireman upon a switching-engine, who was standing upon the footboard of the engine, and was thrown off by the jolting of the engine in crossing frogs and switches. It was held that the plaintiff had full knowledge of the danger, and assumed the risk, and that the defendant was not in fault. In *Ferren v. Old Colony R. R. Co.*, 143 Mass. 197, the plaintiff was injured by being pressed between a car which he was pushing and a building. He knew the position

of the building and of the car, but did not appreciate the peril. The court say: "The material point of distinction between this case and many others is, that here it is open to the jury to find that the plaintiff did not know or appreciate the risk of the work upon which he was engaged, and that, in the exercise of due care, he was not, as matter of law, bound to know or appreciate the same."

In the case at bar, we think that the danger was not so obviously incident to the employment that the plaintiff can be held to have assumed the risk of injury from it, and that it cannot be said, as matter of law, that he was bound to know and appreciate the danger.

New trial granted.

MASTER AND SERVANT — ASSUMPTION OF RISKS BY THE SERVANT. — To constitute an assumption of risks by a servant, it is not necessarily enough, that he knew, or ought to have known, the actual character and condition of the defective instrumentalities furnished for his use, but he must also have understood, or by the exercise of ordinary observation ought to have understood, the risks to which he is exposed: *Rolsell v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637, and note; compare *Hosie v. Chicago etc. R. R. Co.*, 75 Iowa, 683; *ante*, p. 518, and note; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep., and note.

COMMONWEALTH v. BROWN.

[147 MASSACHUSETTS, 585.]

JURORS. — THE INHABITANTS OF A TOWN ARE NOT DISQUALIFIED FROM ACTING AS JURORS on a trial of persons accused of forging and uttering discharges for money payable from the treasury of such town.

JURORS. — INHABITANTS OF A MUNICIPALITY ARE COMPETENT TO ACT AS JURORS ON A TRIAL WHEN SUCH MUNICIPALITY HAS NO DIRECT PECUNIARY INTEREST, but only such interest as results from the commission of an offense against its property. This is especially true when the trial is for an offense which, under the statute, cannot be prosecuted in any other place.

INDICTMENT FOUND BY A GRAND JURY, ONE OF WHOSE MEMBERS WAS IRREGULARLY DRAWN, but who possessed all the requisite qualifications, is valid. The general rule is, that mere irregularity in the proceeding by which a juror gets on the panel does not affect the validity of his action. Hence it was held that an objection to an indictment was properly overruled, where it appeared that a person's name had been ordered to be stricken from the jury list by a vote of the town, but notwithstanding this, his name was placed in the box, and was drawn by the selectmen, and returned to court, and he was sworn and acted as one of the grand jury in finding the indictment in question.

VARIANCE. — INDICTMENT FOR FORGING CERTAIN WRITINGS, referred to as "discharges for money," and purporting to be bills rendered against a town by sundry persons for services rendered or articles furnished by such person to such town, is supported by evidence showing that the defendant forged such papers, and presented them merely as vouchers for money which he claimed to have expended for the benefit of the town, without any express authority, and that such claims were allowed him by the disbursing officers of the town.

THE INTENT TO DEFRAUD, WHICH IS ESSENTIAL TO THE CRIME OF FORGERY, MAY RELATE TO A PARTY NOT NAMED in the instrument.

INDICTMENT, tried in the superior court of the county of Nantucket, containing twenty-two counts, for forging and uttering certain discharges for money, each of which purported to be a bill rendered to the town or county of Nantucket for services rendered or for articles furnished to such town. The defendant filed a special plea to the presentment on the following grounds: 1. Because one A. D. Winslow had acted as one of the grand jury in finding such indictment, and he had not been legally put upon the list of jurors, or legally drawn for jury service; 2. Because the list of jurors from which the said jurors were selected was not legally accepted by the inhabitants of the town of Nantucket at a legal meeting; 3. Because the names of the grand jurors were not drawn from the list of jurors in the manner provided by law. A replication was filed to this plea, by which its allegations were denied. With respect to the name of the grand juror Winslow, the testimony showed that it had been upon the list of jurors prepared by the town selectmen, but had been ordered to be stricken from such list by a vote of the town. The name was nevertheless left in the jury-box, and was drawn by the selectmen, and Winslow was sworn and acted as a member of the grand jury. The court decided that the presentment was valid. The evidence received at the trial established that the receipted bills described in the indictment were presented by the defendant while acting as town and county clerk, and clerk of the courts thereof, to the town and county disbursing officers, not as claims then due the persons named in such bills, but as vouchers for moneys which he claimed to have expended on behalf of the town without express authority, and to support his claim for the reimbursement of such moneys. The reimbursements were allowed, and the defendant actually collected the amounts set forth in the vouchers. The judge refused to give instructions asked by the defendant numbered and in substance as follows: 1. That, as between the

defendant and the town or county, none of the forged papers was a discharge for money; 5. That if a person makes a purchase or pays a bill, assuming, as a volunteer, to act for the county, and then claims reimbursement, the receipted bill which he presents to support such a claim is not a discharge for money; 9. That it must appear that the intent to defraud by the forgery must be an intent to defraud some person who is a party to the instrument, and not another person to whom the instrument is intended to be exhibited collaterally, and as evidence or a voucher for an independent claim; 11. That, upon the evidence, there is a variance of the description of the instrument in each count; 12. That the jury must acquit, unless they find an intent to defraud some person other than the town or county of Nantucket. Verdict of guilty. The defendant excepted.

H. C. Bliss, assistant attorney-general, for the commonwealth.

H. W. Chaplin, and L. E. Griswold, for the defendant.

KNOWLTON, J. The indictment in this case contains twenty-two counts, some charging the defendant with forging, and others with uttering, discharges for money, payable from the treasury of the town and county of Nantucket. The defendant pleaded in abatement to the indictment, and upon the facts which appeared at the hearing he asked the court to rule that, "by reason of bias and interest, a grand jury drawn and made up from the inhabitants of the town and county of Nantucket was not competent to make a presentment for crimes against the county or the town treasury." The court refused so to rule, and ruled that the presentment was valid.

We may assume that the defendant is right in his contention that objections to an indictment on account of the disqualification of a grand juror may be taken when the defendant is first called upon to plead to the indictment; for, under our practice, it commonly happens that he has no opportunity to make his objection earlier: See *Commonwealth v. Parker*, 2 Pick. 550, 559; *State v. Symonds*, 36 Me. 128; *United States v. Hammond*, 2 Woods, 197. At a later stage of the proceedings the defendant made a similar objection to the jury of trials, which was also overruled. These questions, founded on the alleged interest of the jurors as residents of the town and county of Nantucket, are substantially the same in relation to the grand jury and to the traverse jury.

The general rule that judges and jurors should not be interested in a controversy which they are called upon to settle is founded upon familiar principles of justice. But there are some kinds of interest which are too minute and too remote to be regarded. Every citizen of the commonwealth is interested in the enforcement of the laws. But if that interest disqualified him from sitting as a juror, or otherwise participating in a trial, no criminal could be punished. From the necessity of the case, we trust the integrity and sense of justice which most men possess, so far as to believe that they will not be improperly influenced by an interest of this kind, which they have in common with the whole community.

In the case at bar, the inhabitants of Nantucket had no direct pecuniary interest in the proceedings. The town and county treasury could not be in any way affected by the result of the prosecution. The judgment which might be rendered could not be used as evidence in a subsequent civil suit. They had no interest different in kind from that of all the people of the commonwealth. We by no means suggest that a victim of a crime should ordinarily be permitted to sit as a juror to try a person accused of committing it, for his feelings would be likely to be so aroused as to render him unfit for such a service. His relation to the matter under investigation would naturally lead him to form an opinion as to the guilt of the defendant, or would induce bias or prejudice; and if this appeared, he would at once be set aside as disqualified to serve as a juror. But the crimes charged in this indictment were not against any of the persons who were upon the jury. They were committed against the town or county of which the jurors were inhabitants; and the bias, prejudice, or other kindred feeling, which might be expected in an individual who had suffered grievous wrong, would not be likely to exist in reference to a crime against the public treasury.

Some of the inhabitants might be so far affected in their feelings as to be unfit for jurors. In respect to the traverse jurors, the defendant could have protected his rights in that particular by asking for an examination of them before they were impaneled: See *Commonwealth v. Moore*, 143 Mass. 136; 58 Am. Rep. 128; *Boston v. Baldwin*, 139 Mass. 315. In regard to the grand jury, it is always possible that some of the jurors will be subject to bias, or will have formed an opinion, in some of the numerous cases which commonly come before them. That possibility is contemplated in the statute which

makes it unnecessary to consider whether the defendant's objection to the traverse jury, taken by plea, was correct or sufficient in form.

Another objection to the indictment raised by the plea first referred to was, that Andrew D. Winslow was not legally drawn as a grand juror, because his name was, by vote of the town, ordered to be stricken from the list of jurors prepared by the selectmen, and submitted to the town for revision. The fact here relied on was proved at the hearing before the judge; and it further appeared that, notwithstanding this, his name was placed or left in the box, and was drawn by the selectmen in response to the *venire* of the court, and was returned to the court, and he was sworn as one of the grand jury, and acted with them in their deliberations and in the return of the indictment. It has often been held in other jurisdictions that an indictment found by a grand jury upon which a disqualified person is sitting is void; for it is not certain in such a case that the indictment was found by twelve qualified jurors. The disqualified person may have been one of only twelve who voted for the indictment: 2 Hawk. P. C., c. 25, sec. 28; *United States v. Hammond*, 2 Woods, 197; *State v. Symonds*, 36 Me. 128; *Doyle v. State*, 17 Ohio, 222; *State v. Cole*, 17 Wis. 674; *Barney v. State*, 12 Smedes & M. 68.

How such an indictment should be regarded is a question which we need not decide; for a distinction must be noted between a juror who is personally disqualified, and one who possesses all the requisite qualifications, but is irregularly and improperly drawn. The general rule is, that mere irregularity in the proceedings by which a juror gets upon the panel does not affect the validity of his action: *Commonwealth v. Parker*, 2 Pick. 550, 559; *Page v. Danvers*, 7 Met. 326; *United States v. Reeves*, 3 Woods, 199; *United States v. Ambrose*, 3 Fed. Rep. 283; *Hill v. Yates*, 12 East, 229, 230; *King v. Hunt*, 4 Barn. & Ald. 430; *Hardin v. State*, 22 Ind. 347. Nearly all the cases in which verdicts or indictments have been set aside rest upon an absolute disqualification of a juror. Such were *United States v. Hammond*, 2 Woods, 197; *Doyle v. State*, 17 Ohio, 222; *State v. Cole*, 17 Wis. 674; *Barney v. State*, 12 Smedes & M. 68; and *State v. Duncan*, 7 Yerg. 271. The case of *State v. Jacobs*, 6 Tex. 99, cited by the defendant, has been reviewed and explained in *Vanhook v. State*, 12 Id. 252, which sustains the contention of the commonwealth. *Dutell v. State*, 4 G. Greene, 125, depends upon a local statute.

Another distinction which should be observed is, that between the case of a juror chosen by a method wholly illegal and unwarranted, and one where the regular course of procedure is pursued in general, but is not strictly and properly followed. *State v. Symonds*, 36 Me. 128, was a case of the former kind, in which the selection of talesmen for a grand jury was held to be without jurisdiction and wholly illegal, and the jurors were decided to be incompetent to serve. The difference between such a proceeding and a failure to regard some of the requirements of the law, where there is an honest effort to act under it, is referred to in *United States v. Ambrose*, 8 Fed. Rep. 283, a case which was very similar to the one at bar. Inasmuch as there was nothing to show that Winslow was disqualified to serve as a juror, or that his being drawn was anything else than an irregularity, we are of opinion that the ruling of the court upon this point was correct.

The only remaining exceptions relied upon are to the refusal of the judge to grant the first, fifth, ninth, eleventh, and twelfth requests for instructions to the jury. The several papers referred to in the indictment were sufficiently described as discharges for money. There was no variance. Upon an indictment for forging or uttering these papers, the circumstances in relation to the payment referred to in the requests were immaterial. The intent to defraud referred to in the statute may relate to a party who is not named in the instrument: Pub. Stats., c. 214, sec. 26; c. 204, sec. 1; *Commonwealth v. Costello*, 120 Mass. 358.

Exceptions overruled.

INDICTMENT. — IT IS NO GROUND FOR QUASHING AN INDICTMENT FOR BURGLARY in breaking into a bank that two of the grand jurors by whom it was found were stockholders in the bank: *Rolland v. Commonwealth*, 82 Pa. St. 306; 22 Am. Rep. 758.

GRAND JURY. — THE ILLEGALITY OF THE GRAND JURY WHICH PRESENTED AN INDICTMENT CANNOT BE TAKEN advantage of on motion to arrest judgment: *State v. Carver*, 49 Me. 588; 77 Am. Dec. 275. But where the grand jury who found an indictment appear from record to have been illegally constituted, a motion in arrest on this ground should be granted: *Miller v. State*, 33 Miss. 356; 69 Am. Dec. 351.

JURY AND JURORS. — WHERE THE CHARTER OF THE DEFENDANT, A CITY, PROVIDED THAT IN AN ACTION to which the city was a party no person shall be deemed an incompetent juror by reason of his being an inhabitant of the city, and in impaneling a jury in an action against the city, the plaintiff, against defendant's objection, excused twelve jurors drawn, because they were inhabitants and tax-payers of the city, such excuse was an error: *Hildreth v. City of Troy*, 101 N. Y. 234; 54 Am. Rep. 686.

JUROR, REJECTION OF FOR BIAS. — A juror may possess the general competency exacted by the common law or by the statutes of the state, and yet be incompetent to try a particular action in which he is called. Very great pains should be taken to prevent the acceptance of a juror whose mind is, from any cause, in such a condition that he is likely to be unable to do justice between the parties. According to some of the expressions, he should stand indifferent between the parties. In some of the cases, the extreme language is used that his mind should be as white as paper. This latter condition of mind, at the present day, when, by the medium of newspapers, information is very extensively disseminated with respect to all cases of considerable importance, cannot be universally insisted upon. The bias or prejudice which will be sufficient to exclude a juror must, we apprehend, be something more than a light or trivial one; it should be one of "those strong and deep impressions which closes the mind against the testimony which may be offered in opposition to them, — which will combat that testimony, and resist its force": 1 Burr's Trial, 473; *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 473.

In popular language, a juror is said to be incompetent to try a case, and therefore subject to challenge, when he is biased or prejudiced for or against either of the parties. Bias "is a particular influential power which sways the judgment; the inclination or propensity of the mind towards a particular object": Bouvier's Dict. Prejudice is "a fore-judgment; a leaning towards one side of the cause for some reason other than its justice": Id.; *Wilks v. State*, 12 Ga. 449.

So far as the term "prejudice" includes the idea of ill feeling towards some of the parties, it may properly be regarded as included within the term "bias." In legal signification, the term "prejudice," when used in connection with the exclusion of jurors, implies a prejudgment of the cause. This prejudgment may result from the previous formation of an opinion respecting the merits of the cause, based upon information derived from some source. This branch of our subject will not here be considered, for the reason that it has already been treated in the note to *Smith v. Eames*, 36 Am. Dec. 521-534. But prejudice or prejudging has sometimes been defined as being "a strong disposition to favor one side or the other; a determination to find in one way, let the evidence be what it will": *McCausland v. McCausland*, 1 Yeates, 378. Considered in this sense, the subject of prejudice falls within the scope of the present note.

THE RIGHT TO UNBIASED OR UNPREJUDICED JURORS is an inseparable and inalienable part of the right of trial by jury. Hence, if a constitution guarantees the right to jury trial in a particular class of cases, this guaranty necessarily includes the right to a trial by unprejudiced jurors, — those who can act without partiality or ill feeling towards either of the parties or their cause. A statute may, it is true, provide for safeguards of this right; may regulate the procedure by which the right is sought to be attained; but it may not destroy the right under pretense of regulating it. A statute may as well provide that a jury shall consist of less than twelve men, or shall decide by a majority vote, as that it may consist of persons who are biased or prejudiced. If the legislature passes a statute which deprives the parties of the right to examine jurors for the purpose of ascertaining whether they are infected by actual bias, and to exclude those who are found to entertain such bias, it is unconstitutional, and must be disregarded: *State v. McClear*, 11 Nev. 39. In this respect, it differs from a statute which declares "that in the trial of any criminal cause, the fact that a person called

as a juror has formed an opinion or impression, based upon rumor or newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as juror in such case if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall believe such statement." Such a statute is defensible on the ground that "the rule which it lays down, when wisely applied, does not lead to the selection of partial jurors. On the contrary, it tends to secure intelligence in the jury-box, and to exclude from it that dense ignorance which has often subjected the jury system to just criticism": *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 469; *Stokes v. People*, 53 N. Y. 171; 13 Am. Rep. 492.

BIAS IS ACTUAL OR PRESUMED. Actual bias is personal favor or hostility to the cause on trial, or to one of the parties as an individual, giving, or at least tending to give, a juror a desire to decide for or against the one side or the other, irrespective of the evidence. Implied or presumed bias is that which is supposed to exist on account of the relation which the juror bears either to the cause or to some of the parties thereto. Actual bias may exist when the juror has no interest in or feeling with regard to the action itself. In fact, personal hostility is the strongest and clearest indication of such bias: *Brittain v. Allen*, 2 Dev. 120; *Freeman v. People*, 4 Denio, 9; 47 Am. Dec. 216; *McLaren v. Birdsong*, 24 Ga. 265; *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465. An opinion or preference existing without any previous knowledge of the cause or of the evidence to be given therein must necessarily be based upon personal feeling, and indubitably establish actual bias: *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *Commonwealth v. Knapp*, 9 Pick. 496; 20 Am. Dec. 491.

While the authorities universally declare that bias or prejudice subjects a juror to challenge and exclusion therefor, it is to be lamented that they do not define or even consider the degree of bias which is necessary to accomplish this result. It is true that in *People v. Reyes*, 5 Cal. 349, the court said: "Prejudice is a state of mind which, in the eye of the law, has no degrees. If the juror is prejudiced in any manner, he is not a fit or proper person to sit in the box." But the remark must be regarded as a *dictum*. The juror had been asked whether he was a member of the order called Know-nothings, and as such had taken an oath in conflict with the oath which should be administered to him as a juror, and whether by his oath or obligation as a member of such society any prejudice existed in his mind against Catholic foreigners, and whether he was not bound by such oath not to give a prisoner of foreign birth, in a court of justice, a fair and impartial trial, and whether he was not under obligation not to extend the same rights, privileges, protection, and support to men of foreign birth as to native-born American citizens; and further, whether he had a prejudice against foreigners generally. The party on whose behalf these questions were asked was a foreigner and a Catholic. The court sustained objections to all these questions, and the appellate court very properly reversed the action of the trial court. It will be seen from an inspection of these questions that an affirmative answer to any of them would have shown at least such a state of prejudice in the mind of the juror against one of the parties to the cause as would have warranted further inquiry for the purpose of ascertaining whether the prejudice was such as was likely to influence him in the decision which, as a juror, it would become his duty to make. But there was nothing in the case before the court rendering it necessary for it to consider how much or how little prejudice would make the exclusion of the juror imperative. Of course, if

by the term "prejudice" the court meant some influence so potent that it must necessarily affect the action of the juror, then it was clearly right in saying that there can be no degrees, for the law undoubtedly intends that the juror shall not be controlled by any foreign or extrinsic influence, and if he will probably be so controlled, that he shall not be permitted to act. But this is far different from saying that there cannot be any degrees of prejudice, or that the court, finding the juror subject to some prejudice, may not and ought not further to proceed in his examination for the purpose of determining whether that prejudice is a controlling one, — one from which the juror either cannot or will not escape when he retires to deliberate with his fellow-jurors upon their verdict: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 469; 1 Barr's Trial, 416.

Whenever a juror shows upon his examination that he himself fears that his deliberations cannot be impartial, or where he expresses a state of feeling from which it appears that his mind is in an improper condition, he will generally be excluded. A class of cases has arisen somewhat frequently in which jurors have been asked hypothetical questions, — as to how they would decide if the evidence should be found to be equally balanced; and in some of the cases, where they have answered that they would decide in favor of a particular party, and that party was the one on whom the burden of proof was cast by law, the juror has been excluded: *G. & S. W. R. R. v. Haslam*, 73 Ill. 494; *C. & A. R. R. v. Adler*, 56 Id. 344; *Meaux v. Whitcomb*, 8 Bradw. 173; *Mima Queen Co. v. Hepburn*, 7 Cranch, 290.

There is no doubt that this class of questions is proper, but the answer of the juror, one way or the other, is not conclusive of further inquiry. He may have made a mistake upon the question of law with respect to where the burden of proof lies, and if so, his mistake can be corrected by the instructions of the court. The later decisions indicate that when a juror has answered that if the evidence were evenly balanced he would decide for a particular party, he should be further questioned for the purpose of ascertaining whether he has, in fact, any prejudice or preference for or against either party, and if he disclaims all bias, and it appears from his answers that he will obey the instructions of the court, and can decide fairly and impartially between the parties, his acceptance by the court as a juror will not be regarded as improper: *Montgomery v. Wabash R. R.*, 90 Mo. 476; *Hudson v. Railroad*, 53 Id. 536; *McFadden v. Wallace*, 38 Cal. 51; *Trenor v. Central Pacific R. R.*, 50 Id. 222; *Richmond v. Roberts*, 89 Ill. 472. If a juror has expressed a wish that one of the parties shall prevail, he may be excluded: *Mason v. State*, 15 Tex. App. 534; *Pike Co. v. Griffin*, 15 Ga. 39. Especially if the wish seems to have proceeded from a belief that the party in whose favor it is made ought to prevail. If a juror states that in case the evidence should be evenly balanced he will find in favor of the plaintiff, and the plaintiff is a municipal corporation of which the juror is a citizen, his exclusion is undoubtedly proper, and the refusal to exclude him will probably occasion a reversal by the appellate court: *Omaha v. Kass*, 15 Neb. 657. Generally, in this class of cases, the action of the trial court will not be reviewed by the

landlords: *Lawlor v. Linsforth*, 72 Cal. 205; and in another action, in which an insurance company was a party, because he said that he had some prejudice in his mind against insurance companies generally, and that his prejudice was founded on the fact that he could not comprehend their proceedings: *Winnesheik Ins. Co. v. Scheuller*, 60 Ill. 472. So prejudice against persons of a particular nationality may amount to a disqualification, but will not do so unless it appears to be sufficiently influential to affect the verdict. A challenge on account of prejudice against a race was held to have been properly refused, where the person on trial was an Italian, and the juror said: "It was a race he was not particularly fond of, and did not think much of, judging from those we have here": *Balbo v. People*, 19 Hun, 424; 80 N. Y. 484. Strong political bias is not sufficient to disqualify a juror, although the indictment is for fraudulent registration of voters: *United States v. Eagan*, 30 Fed. Rep. 608.

BIAS AGAINST THE BUSINESS IN WHICH A PARTY IS ENGAGED will not amount to a disqualification, unless it leaves the juror in a state of mind in which he will probably not give proper weight to the oath of the party, should he be examined as a witness: *United States v. Borger*, 7 Fed. Rep. 193; *United States v. Duff*, 6 Id. 45; *Meretzek v. Caldwell*, 2 Abb. Pr., N. S., 407; 5 Robt. 660; *Elliott v. State*, 73 Ind. 10; *Shields v. State*, 95 Id. 299; *Robinson v. Randall*, 82 Ill. 512; *Chandler v. Ruebett*, 83 Ind. 139; or in which he would be willing to resort to violent and unlawful means to suppress the business in which the party was engaged: *Albrecht v. Walker*, 73 Ill. 69.

PREJUDICE AGAINST THE PARTICULAR CLASS OF CASES, or against the defense interposed, may amount to actual bias, and when such is the case it will justify the exclusion of the juror, especially if it appears from his testimony that he distrusts his ability to act impartially: *Anson v. Dwight*, 18 Iowa, 241; *People v. Carpenter*, 38 Hun, 490; 102 N. Y. 238; *Butler v. State*, 97 Ind. 378. But to sustain a challenge on this ground, it should appear to the satisfaction of the court that the prejudice of the party challenged will influence his judgment: *McCarthy v. Cass Ave.*, 92 Mo. 536. If the class in question is a criminal class, or one against which all law-abiding citizens ought to have a bias, their bias cannot exclude them: *Winnesheik v. Schueller*, 60 Ill. 465. Thus in the case of *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 470, a juror stated that he had a prejudice against socialists, communists, and anarchists. The trial court refused to sustain a challenge upon that ground; and in sustaining this action, the appellate court said: "This did not disqualify him from sitting as a juror. If the theories of the anarchists should be carried into practical effect, that would involve the destruction of all law and government. Law and government cannot be abolished without revolution and bloodshed and murder. The socialist or anarchist, if he attempted to put into practical operation his doctrine of a community of property, would destroy individual rights in property. Practically considered, the idea of taking a man's property from him without his consent for the purpose of putting it into a common fund for the benefit of a community at large involves a commission of theft and robbery. Therefore the prejudice which the ordinary citizen who looks at this from a practical standpoint would have against anarchism and communism would be nothing more than a prejudice against crime."

PREJUDICE OR BIAS AGAINST CRIMES, or unlawful acts, will not disqualify the jury from trying a person charged with the commission of such an act, where it appears that there is no bias against him as an individual. To hold otherwise would be to commit the trial of criminal prosecutions to those per-

sons whose ideas of law and morality were so lax that they were indifferent to the execution of laws and the perpetration of crimes. In other words, it would leave criminals to be tried either by other criminals, or by those who had a strong sympathy with criminals as a class: *Davis v. Hunter*, 7 Ala. 135; *State v. Burns*, 85 Mo. 47; *Kroer v. People*, 78 Ill. 294; *Albrecht v. Walker*, 73 Id. 69; *Williams v. State*, 3 Ga. 453. So it has been held that the formation of an opinion with respect to the general character of a prisoner will not disqualify a juror from trying him, where such opinion is unmixed with personal hostility: *People v. Allen*, 43 N. Y. 28; *Monroe v. State*, 23 Tex. 210; *Anderson v. State*, 14 Ga. 709; *People v. Mahoney*, 18 Cal. 180. This ruling seems very questionable, for if the juror has such information as, even before any evidence is received, impresses him with the conviction that the person accused is a member of a criminal class, or a bad character, his state of mind can hardly be regarded as "white as paper," in the sense in which those terms are used in the decisions on this subject. On the other hand, it is said that to hold an opinion respecting the character of an accused to operate as a disqualification might prevent notorious offenders from being tried at all: *People v. Lohman*, 2 Barb. 216.

THE FRIENDLY OR UNFRIENDLY FEELING which disqualifies one from acting as a juror must be towards one of the parties to the action, or one who, if not a party, is beneficially interested therein. Prejudice against a third person cannot disqualify a juror: *Strawn v. Cogswell*, 28 Ill. 457. A juror is not disqualified by the fact that he entertains feelings of hostility towards a prosecutor, where a defendant is being tried under an indictment for libel: *Coleman's Case*, 2 City H. Rec. 89; or towards the attorneys of one of the parties to the action: *Hutchinson v. State*, 19 Neb. 262. Apparently in conflict with these views is the case of *Lewke v. Dry Dock*, 46 Hun, 283, in which it was held that a juror ought to have been excluded because it appeared that one of the chief witnesses to be called during the progress of the trial was a physician in whom the juror had very great confidence, and on whom he would place more reliance as a witness than on any other person.

INTEREST OF THE JUROR IN THE SUBJECT-MATTER of the action, or in the result of the litigation, is treated as actual bias, and disqualifies him from acting in the case. In the absence of any statutory limitation, the degree of interest seems to be immaterial, and the challenge will be allowed if the juror has any interest whatever: *Davis v. Allen*, 11 Pick. 466; 22 Am. Dec. 386; *Clark v. Lamb*, 2 Allen, 396; *Courtwright v. Stickler*, 37 Iowa, 382. The juror may, by his own act, have created an interest in the suit after it was instituted. A familiar instance of this is where he makes a wager that it will be decided the one way or the other. In truth, he who makes a wager is generally disqualified, for two reasons: 1. Because he has given himself an interest in the result of the suit; and 2. Because the fact of his laying the wager indicates that he supposes himself to be sufficiently informed with respect to the merits of the litigation to be able to determine the final result. He is therefore properly subject to challenge both upon the ground of interest and of having formed and expressed an opinion with respect to the result. That the amount of the wager is trifling will not prevent its disqualifying effect: *Cluverius v. Commonwealth*, 81 Va. 787; *Seaton v. Swann*, 58 Iowa, 41; *Elsen v. McPherson*, 64 Ill. 349.

THE INTEREST SUFFICIENT TO DISQUALIFY A JUROR NEED NOT BE DIRECT, but may be incidental or contingent. Thus in the case of *Small v. Jones*, 6 Watts & S. 122, one Watson was challenged, and the challenge allowed, because it appeared that he was the executor and son-in-law of one Oves, to

whom the plaintiff in the action was indebted; that the plaintiff was insolvent, and that his recovery of judgment in the action would aid in the enlargement of the fund to be applied towards the payment of his debts, including the debt owing to the estate of Oves. The action of the court in sustaining this challenge was sustained, the appellate court remarking that "it was certainly very natural to suppose that Mr. Watson felt some interest in recovering the debt which it was his duty to collect as executor, if practicable, and, therefore, could not be considered as altogether free from bias in regard to the event of the issue between the parties here." In an early case in Vermont, the court expressed the opinion that if a juror had once had a direct interest in the event of the suit his disqualification arising therefrom was perpetual in its operation, and that the court could not regard him as being purged of his bias in mind by the fact that the interest which he once had had ceased, and the result of the action could no longer affect him in any manner: *Phelps v. Hall*, 2 Tyler, 401.

INTEREST IN THE QUESTION AT ISSUE is, for the purpose of disqualifying a juror, equivalent to direct interest in the result of the suit: *Talmage v. Northrop*, 1 Root, 455. If the same facts which will warrant a verdict in favor of the plaintiff will support an action under the trustee statute in favor of the juror against the same defendant, a challenge to the juror must be allowed: *Davis v. Allen*, 11 Pick. 467; 22 Am. Dec. 386. In a proceeding against a city or town to assess damages occasioned to adjoining land by the raising or lowering of the highway, a person who, though not residing in said city or town, has a claim against it of like character to that in controversy, and feels himself aggrieved and injured by the alteration in question, is not competent to sit on the jury: *Flagg v. Worcester*, 8 Cush. 69. In a proceeding for laying out and opening a street, and taking private property therefor, the "property owner is entitled to an impartial as well as a disinterested jury, and a juror who is especially interested in having the street opened by reason of some special gain or convenience to him, from which he expects to derive more than the community generally, is disqualified, and may be challenged and rejected for cause": *Kundinger v. Saginaw*, 59 Mich. 359. If, in an action upon a contract, the juror states that he is a party to a contract substantially the same as the one sued upon, and that he had united with others in making defense to like contracts executed by other persons, the challenge to the juror must be sustained: *Courtwright v. Stickler*, 37 Iowa, 382. "The fact that a juror stood indicted and untried for the same kind of offense as that of which he was called upon to try another person would most naturally create a bias in his mind, and a disinclination to giving a verdict against the accused, for the verdict would, in a greater or less degree, have the effect of a precedent either for or against a conviction in similar cases, and the situation of such a juror appears to come fully within the principle which requires the juror's mind to be free from all bias and prejudice, and especially such as has relation to his own interest": *McGuire v. State*, 37 Miss. 369. It seems that having been interested in the same question will not operate as a continual disqualification after the interest has ceased, and all the suits involving the question in which the juror had an interest have been determined: *Austin v. Cox*, 60 Ga. 520.

INTEREST AS A MEMBER OF A PRIVATE CORPORATION disqualifies a juror as effectually as though he were a nominal party to the suit, and it is immaterial that the amount of his interest in the result is very trifling or inconsiderable: *Respublica v. Richards*, 1 Yeates, 480; *Fleeson v. Savage Mining Co.*, 3 Nev. 157; *Peninsula R. R. v. Howard*, 20 Mich. 18; *Page v. Contoocook Val-*

the cause of action may have some connection with the corporation or its officers, unless it is possible that the result of the trial will affect the juror in some way. Hence, in an action against an officer of a corporation to recover a penalty imposed by statute, the juror is not disqualified if the recovery against the officer will not entitle him to some cause of action against the corporation, and thus, in the end, establish a liability to the payment of which the juror may be made to contribute: *Williams v. Smith*, 6 Cow. 166. In the case of *Bills v. State*, 2 McCord, 12, it was ruled that the director of a bank, one of whose bills had been forged, was competent to act as juror on the trial of a person charged with such forgery, but it appeared that the director owned no stock in the bank, and could have no other interest in the institution than that common to all the citizens of the state.

INTEREST AS CITIZEN OF MUNICIPAL CORPORATION. — A familiar and extreme illustration of the rule that the amount of a juror's interest will not be regarded as material in determining whether or not he is disqualified by reason of such interest exists in the class of cases in which objection has been made to a juror on the ground of his being a member of a municipal corporation, and as such interested, though in an infinitesimal degree, in the verdict to be given. If the action is against a city for damages, or for the direct recovery of money on any other ground, so that the judgment might result in the imposition of an additional tax on the juror or his property, the authorities declare almost unanimously that he is disqualified, both at the common law and under all the statutes which exclude persons having an interest in the event of the litigation: *Olson v. Wyandotte*, 20 Kan. 156; *Mayor of Columbus v. Gostchke*, 7 Ga. 139; *Bailey v. Trumbull*, 31 Conn. 581; *Cramer v. Burlington*, 42 Iowa, 315; *Disney v. Minira*, 51 N. Y. 506; *Hearn v. City of Greenburgh*, 51 Ind. 119; *Regina v. Wills*, 6 Mod. 307; *Day v. Savadge*, Hobart, 85; *Hebeth v. Braddock*, 3 Burr. 1847; *Garrison v. Portland*, 2 Or. 123; *Watson v. Tripp*, 11 R. I. 93; *Fuchsler v. St. Louis*, 51 Mo. 479; *Fine v. Public Schools*, 30 Mo. 166; *Kendall v. City of Albia*, 73 Iowa, 243. In *Bassett v. Governor*, 11 Ga. 207, an attempt was made to distinguish a case in which a municipality was a party plaintiff, seeking to recover a judgment for moneys due from a defaulting tax collector and his bondsmen from a case in which it was a party defendant, against which a money judgment was sought; and it was said that in the former case, as the judgment, though against the municipality, might not occasion a necessity for the levying of additional taxes, a tax-payer was not incompetent to act. But upon principle, the two cases are indistinguishable: *Russell v. Hamilton*, 2 Scam. 56. A tax-payer is equally interested whether the effect of the judgment may be to lessen or to increase his taxes. The fact that one of the jurors called in proceedings relating to bastardy process is an inhabitant of the same town with the complainant is, in Massachusetts, a ground of disqualification, because the provisions of the statute regulating such proceedings are such as to create "a direct interest in the inhabitants of the town where the complainant resides and has her settlement": *Hauss v. Gustis*, 2 Allen, 404. So a tax-payer of a town is disqualified to act as a juror in an action to recover a penalty one half of which, when recovered, will go to the poor of the town: *Weed v. Stoddard*, 2 Johns. 194. In *State v. Williams*, 20 Me. 484, it was decided that an inhabitant of a town was incompetent to try an indictment in which the defendant was charged with maliciously secreting a book of town records, because, in the event of his conviction, the defendant became liable to the town for three times the value of the property. Probably this case carried the

rule of exclusion further than can be successfully defended. The general interest which all good citizens and tax-payers have in the enforcement of laws is a qualifying rather than a disqualifying one. Infractions of the law may be punished by fines, payable into the treasury of the town or municipality, but we think this cannot justly be regarded as rendering all the citizens of the municipality incompetent to try offenses which may be so punished. *Middletown v. Ames*, 7 Vt. 166. A juror is competent to try one accused of violating an ordinance of the city in which the juror resides: *State v. [unintelligible]*, 46 Iowa, 662; or to try one accused of the murder of a policeman, although the city has employed counsel to aid in the prosecution: *Doyal v. State*, 134; or to try a person indicted for stealing the property of a county of which the juror is a tax-payer: *People v. Bennett*, 37 N. Y. 177; 93 Am. Dec. 134; or for burning the jail of such county: *Phillips v. State*, 29 Ga. 105. Instances may arise in which the trial must take place before tax-payers or citizens of a town, county, or city, or it cannot take place at all; as where there is no statute authorizing a change of the place of trial. In such cases, to prevent a failure of justice, the rule of exclusion must yield to the necessities of the case, and the trial be had before the citizens of the municipality; but the court will exercise all its discretion to obtain jurors the least likely to be affected by their interests as members of the municipality: *Bassett v. Gov. [unintelligible]*, 11 Ga. 207; *Commonwealth v. Ryan*, 5 Mass. 90, and the principal case.

If the adverse party is content to have a juror act whose citizenship the municipality appears to disqualify him, the city cannot challenge him on that ground, and insist on his exclusion from the jury. "The right of challenge is allowed the parties as a means of protecting their interests. It is not a ground of challenge by one party that the juror has an interest adverse to that of the other": *Conklin v. City of Keokuk*, 73 Iowa, 347.

In Kentucky, the fact that a juror is a tax-payer of a municipality, prior to the action, does not amount to an absolute disqualification. The judge may accept him as a juror, if satisfied, after due examination, that his bias is not such as will influence his judgment: *Kemper v. Louisville*, 14 Ky. 87; and the opinion in *Omaha v. Olmstead*, 5 Neb. 446, contains a dictum to the like purport.

In nearly half of the states, statutes have been enacted permitting tax-payers to act as jurors in many cases, notwithstanding their interest in the suit as members of a municipality, party to the suit: *Thompson on Trials*, sec. 100; *Baltimore etc. R. R. Co. v. P. W. R. R.*, 17 W. Va. 812. The removal of the disqualification attached to one as an inhabitant of a municipality does not affect his incompetency arising from his being a member of the common council of a city. In a case in which this question arose, the supreme court of Massachusetts said: "The juror in the case at bar was not disqualified merely because he was an inhabitant of Boston. But he occupied a position or relation towards the cause and the parties different from that occupied by the ordinary inhabitant. He was a member of the common council, a branch of the government of the city. The municipal government has authority and control over all suits brought or prosecuted by or against the city. It represents the city, and is the guardian and protector of its rights. It is the duty of the juror in question, as a part of the government, to guard and protect the rights of the city. This relation to the city is inconsistent with his serving as a juror in the suit. It would not only create a suspicion of bias, but would naturally tend to create a bias or prejudice in his mind in favor of the city. There can be no certainty that a juror thus situated would stand indifferently and impartially between the parties. The statute d

not cover the case, and there is no necessity that members of the city government should act as jurors in cases to which the city is a party": *Boston v. Baldwin*, 139 Mass. 315.

A STATUTE ATTEMPTING TO REMOVE THE DISQUALIFICATION attached to a juror by reason of his interest, according to the rules of the common law, is liable to serious constitutional objection in those states by whose constitutions citizens are guaranteed the privileges of trial by jury. Such statutes, if defensible at all, must be sustained upon the ground that the disqualification is theoretical rather than real; that it cannot and will not sensibly affect the action of the juror. The only cases which we have been able to discover in which this question was discussed arose in Massachusetts. In that state the declaration of rights secured to every citizen "the right to be tried by judges as free, impartial, and independent as the lot of humanity will admit." A statute was enacted declaring that "in indictments and penal actions for the recovery of any sum of money, or other thing forfeited, it shall not be a cause of challenge to any juror that he is liable to pay taxes in any county or town which may be benefited by such recovery." A conviction having been had in a case falling within the provisions of this statute, the constitutional power of the legislature to enact it was questioned, but the supreme court disposed of the question in the following language: "We do not think that this can be considered as a difficult, or at the present time as hardly an open, question. Laws of the same general character, and intended to have a similar effect, have frequently and at different periods in our legislative history been enacted. The jurisdiction given the police and municipal courts in Boston of cases arising under the statute of 1785, chapter 66, concerning illegitimate children; the general provision relating to magistrates, jurors, appraisers, and other officers, in suits and processes in which the town or city of Boston is interested (Stats. 1815, c. 103; R. S., c. 90, sec. 124, p. 808); and the special authority conferred on the justices in most, if not in all, of the statutes creating police courts in the different towns and cities where they are established, — may be mentioned as instances of similar legislation.

The validity of these statutes, and others having a like effect, has been recognized and affirmed by frequent judicial decisions. The question was raised and carefully considered in the early case of *Commonwealth v. Ryan*, 5 Mass. 90. There the jurors by whom the indictment was found, and those by whom it was tried, were all inhabitants of the then town of Boston, to whose use the penalty for the offense was given. The objection taken to the jurors was not sustained. And Parsons, C. J., in giving the opinion of the court, said that "the law must be considered as repelling the objection of interest." And he added: "There can be no good reason why the legislature may not constitutionally provide that a remote and small corporate interest shall not be a legal objection to a juror's trying a cause in which the defendant may be sentenced to pay for the use of the commonwealth a fine imposed by a public statute." This decision was subsequently recognized as resting upon a sound and safe principle, and the opinion was distinctly expressed that a statute declaring that any interest which an inhabitant of the city of Boston might have in a penalty to be recovered by indictment should not be a disqualification disabling him to act as a juror was a valid and constitutional provision: *Commonwealth v. Worcester*, 3 Pick. 462. And in another case it was said to be too plain to be doubted that a statute giving jurisdiction in criminal cases to police courts, the justices of which had an interest, as members of a municipal corporation, in the fines imposed

upon or recovered of offenders, was a constitutional act: *Hill v. Wells*, 6 Pick. 104. To the same effect, also, is the reasoning and the opinion of the court in *Commonwealth v. Emery*, Middlesex, 1853.

It is certainly true, and we should never fail to affirm, that it is a duty imposed upon the legislature to provide for the administration of justice, as far as may be practicable, judges and jurors impartial and independent, and free from the influence and bias of every species of interest. But absolute exemption is not always possible; and exemption from an interest which is only theoretic or imaginary, or which is so remote and trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual is not essential. Fines which, when recovered, go into the treasury of the state affect every citizen; those which are received by a particular municipal corporation affect only such as through taxation contribute to the payment of the charges it incurs. Such an interest as arises from that cause is remote and minute, and it may well devolve upon the legislature to determine if it ought to disable an otherwise impartial citizen from serving in the capacity of a juror. The rule established by such authority must, in general, be the guide by which courts of law will be controlled. It is not, indeed, possible that through accident, or even under the guise of necessity, a statute might be enacted in violation of the great principle asserted in the constitution, that "it is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit": Declaration of Rights, art. 29. But this is not to be presumed. Nothing of that kind appears in the statute under our present consideration. Should such an act of legislation ever be found to exist, we may safely anticipate that it will be held to be inoperative and void": *Commonwealth v. Reed*, 1 Gray, 472.

ACTUAL BIAS IS PRESUMED FROM THE RELATION OF THE JUROR TO THE PARTIES to the action, or some of them. The relationship to which this presumption attaches may be classified as, — 1. The relationship of kindred; 2. Business relations; and 3. Social relations, consisting chiefly of the relations of men organized into societies for some special purpose.

RELATIONSHIP OF KINDRED DISQUALIFIED A JUROR, if he was related to either of the parties within the ninth degree computed according to the rules of the civil law: *Paddock v. Wells*, 2 Barb. Ch. 331; *Jacques v. Commonwealth*, 10 Gratt. 690; *Morrison v. McKinnon*, 12 Fla. 552; *State v. Perry*, Busb. 330. "By this law, two men are considered related to each other only in that number of degrees which exists between them, to be counted by reckoning from one up to their common ancestor, and then down to the other": *Churchill v. Churchill*, 12 Vt. 661. Thus if the great-grandmother of the juror and the grandmother of one of the parties were sisters, the juror and the party are related within the seventh degree; for the number of degrees between the juror and the common ancestor are four, and between the party and such ancestor three: *State v. Berry*, Busb. 330. A cousin of one of the parties is disqualified: *Rust v. Shackelford*, 47 Ga. 538. In fact, third cousins are within the ninth degree of kindred, and hence disqualified from acting as jurors for or against each other: *O'Connor v. State*, 9 Fla. 215.

Statutes have been enacted in many of the states under which persons are permitted to act as jurors, though more closely related to some of the parties than would have been permitted at the common law. In Alabama, relationship by affinity is no longer a disqualification unless within the fifth degree: Code of Alabama, sec. 4186. In Maine and Indiana, a juror is regarded as disinterested and indifferent unless within the sixth degree: *Hardy*

v. *Sproule*, 32 Me. 310; *High v. Big Creek Ditching Ass'n*, 44 Ind. 336; and in Vermont, California, and some other states, unless within the fourth degree: *Churchill v. Churchill*, 12 Vt. 661; Cal. Pen. Code, sec. 1074; Cal. Code Civ. Proc., sec. 602, subd. 2; *Marion v. State*, 29 Neb. 233.

RELATIONSHIP BY AFFINITY, at the common law, and under the statutes of the majority of the states, is as potent a cause of disqualification as by consanguinity: *O'Connor v. State*, 9 Fla. 215; *Paddock v. Wells*, 2 Barb. Ch. 331; *Dailey v. Gaines*, 1 Dana, 529; *Jacques v. Commonwealth*, 10 Gratt. 690; *Marshall v. Ewe*, 1 Dyer, 37 b. Affinity, according to Mr. Bouvier, is "a connection formed by marriage, which places the husband in the same degree of nominal proquinity to the relations of the wife as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband. Affinity or alliance is very different from kindred. Kindred are relations by blood; affinity is the tie which exists between one of the spouses with the kindred of the other; thus the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, etc., are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity." "Affinity properly means the tie which arises from marriage betwixt the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband. Consequently, while the marriage tie remains unbroken, the blood relatives of the wife stand in the same degree of affinity to the husband as they do in consanguinity to her. Thus the father of the wife stands in the first degree of affinity to his son-in-law as he does in the first degree of consanguinity to his daughter. Relationship by affinity may also exist between the husband and one who is connected in marriage with a blood relative of the wife. Thus where two marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity": *Paddock v. Wells*, 2 Barb. Ch. 331. "The consanguineous relations of relatives by affinity are not related at all. Relationship by affinity does not extend to the nearest relatives of the husband and wife so as to create a mutual relation between them": *ONeal v. State*, 47 Ga. 229; *Moses v. State*, 11 Humph. 232; *Rank v. Shewey*, 4 Watts, 218.

No very clear test of affinity has been formulated for the purpose of being applied to the determination of the question whether a juror is disqualified in any particular case. The disqualification, if it exists, results either, — 1. From the relation of the juror's wife to a party to the action; or 2. From the relation of the juror to the wife of such party. If the objection to the juror is based on his marriage to a relative of a party to the action, the test is to inquire whether the wife of the juror would be competent to try the cause if her sexual disqualification were removed; if, on the other hand, the objection is on the ground of the marriage of a party to a relative of the juror, the test is to inquire whether the juror would be competent to try the action if such relative were a party thereto. As falling within the first class, a juror should be excluded when his wife is a sister of a brother of plaintiff's husband: *Dearmond v. Dearmond*, 10 Ind. 191; or a sister of a person who is bound for the payment of the judgment in case it was against the defendant: *Woodbridge v. Raymond*, Kirby, 280; or sister of a person who had a cause pending depending on the same principle: *Hartford Bank v. Hart*, 3 Day, 491; or where juror's wife was daughter of defendant's brother: *Den v. Clark*, 1 N. J. L. 446. As falling within the second class, a juror should be excluded if the wife of a party is his niece: *Trullinger v. Webb*, 3 Ind. 198; *Dailey v. Gaines*, 1 Dana, 529; or his cousin: *Hardy v. Sproule*, 32 Me. 310.

In the following cases, there is no such relationship by affinity as will exclude the juror, because he is not related to the wife of a party to the action, nor is his wife related to such party within the prohibited degrees: Where the brother of a juror was husband of a sister of the defendant: *Chase v. Jennings*, 38 Me. 44; where juror's sister was the wife of the plaintiff's nephew: *Rank v. Shevey*, 4 Watts, 218; where juror's sister and niece were wives of two brothers of parties to the action: *Johnson v. Richardson*, 52 Tex. 481; where an uncle of defendant married an aunt of the juror, and two uncles of the juror married aunts of the defendant: *Bigelow v. Sprague*, 140 Mass. 425.

Relationship by affinity terminates on the death of the person by whose marriage it was created. It is, therefore, incumbent upon him who challenges a juror because of his relation by affinity to some of the parties to the action to prove the continuance as well as the beginning of such relation: *State v. Shaw*, 3 Ired. 532; *Dearmond v. Dearmond*, 10 Ind. 191; *Cain v. Ingham*, 7 Cow. 478; *Chase v. Jennings*, 38 Me. 44; *Jacques v. Commonwealth*, 10 Gratt. 690; *Carman v. Newall*, 1 Denio, 25; *Vannoy v. Gives*, 23 N. J. L. 532. If, however, the marriage has resulted in issue who are still living, the relationship by affinity continues, and a challenge to the juror must be sustained: *Jacques v. Commonwealth*, 10 Gratt. 690; *Mounson v. West*, 1 Leon. 88; *Dearmond v. Dearmond*, 10 Ind. 191; *Bigelow v. Sprague*, 140 Mass. 425.

It is sometimes said that relationship, whether by affinity or consanguinity, will not disqualify a juror, unless it is with a party to the action. It is true that a juror is not ordinarily disqualified by reason of his relationship to the counsel therein: *Funk v. Ely*, 45 Pa. St. 444; *Wood v. Wood*, 52 N. H. 422; *Pipher v. Lodge*, 16 Serg. & R. 214; nor by the fact that he is a relative to the district attorney who is conducting a criminal prosecution: *State v. Jones*, 64 Mo. 391. But the reason why relationship to an attorney or counsel in the cause does not disqualify a juror is because it is assumed that such attorney or counsel has no interest in the result of the litigation. If this assumption is displaced by showing that the counsel has a contingent interest in the action, his relatives are no more competent to try it than though it were conducted in his name and for his sole benefit: *Melson v. Dickson*, 63 Ga. 682; 36 Am. Rep. 128.

RELATIONSHIP TO A PARTY BENEFICIALLY INTERESTED IN AN ACTION has the like disqualifying effect as if he were also named as a party on the record, as where the juror is related to a stockholder in a corporation defendant or plaintiff: *Bank v. Leavens*, 20 Conn. 87; 50 Am. Dec. 272; *Georgia R. R. v. Hart*, 60 Ga. 550; *Young v. Marine Ins. Co.*, 1 Cranch C. C. 452; or father of a tax-payer of a plaintiff town: *Carew v. Howard*, 1 Root, 324; or to one who may be called upon to pay any judgment which may be recovered: *Woodbridge v. Raymond*, Kirby, 280; or to one interested in the principle involved in the pending action: *Hartford Bank v. Hart*, 3 Day, 491; or related to a county commissioner who aided the prosecution of a cause by employing counsel therein: *Dumas v. State*, 62 Ga. 58. In Texas, it has been decided that in all actions which affect the community property of the husband and wife, she must be regarded as "substantially a party to the suit": *Houston etc. R. R. v. Terrill*, 69 Tex. 650; *Brotherton v. Simpson*, 62 Id. 170. So on the trial of persons charged with the commission of a crime, relatives of the person injured by its commission are not competent to try the accused: *Jacques v. Commonwealth*, 10 Gratt. 690; *State v. Anthony*, 7 Ired. 234. Relatives of prisoners who have escaped have also been adjudged

incompetent to try an officer indicted for permitting such escape: *State v. Baldwin*, 80 N. C. 390.

On the other hand, the fact that the party to whom the juror is related is not prosecuting the action for his personal benefit seems not to constitute any exception to the rule excluding from the jury-box relatives of parties litigant. An administrator suing in his representative capacity has, it is said, no more right to have his action tried by his relatives than any other litigant: *Balsbaugh v. Fraser*, 19 Pa. St. 95.

CERTAIN BUSINESS RELATIONS ARE CONCLUSIVELY PRESUMED TO IMPLY A STATE OF MIND OR INTEREST on the part of the juror rendering it impossible for him to act impartially between the parties. The relation of landlord and tenant was formerly one of much greater dependence than at present; and the common law did not admit that the tenant could be trusted to try a cause in which his landlord was a party: *Pipher v. Lodge*, 16 Serg. & R. 110; *Harrisburg Bank v. Foster*, 8 Watta, 304; *Hathaway v. Helmer*, 25 Barb. 29. The disqualification of the landlord, on the other hand, to try a cause to which his tenant was a party seems to have been less absolute and unconditional, and to have constituted a ground of challenge to the favor only: *People v. Bodine*, 1 Denio, 306. The guest of an innkeeper who pays for his accommodations and is under no special obligations to the innkeeper is not disqualified as a juror in a cause to which the latter is a party: *Cummings v. Gann*, 52 Pa. St. 484. The relation of a tenant to persons having a contingent interest in the suit seems not to amount to a disqualification. Hence a challenge to a juror on the ground that he is a tenant to a bondsman for the prosecution of the action, or to a nobleman whose interest in the borough is supposed to be capable of being affected by the result of the prosecution, should be denied: *Brown v. Wheeler*, 18 Conn. 199; *Marsh v. Coppock*, 9 Car. & P. 480.

EMPLOYEES ARE DISQUALIFIED TO SIT AS JURORS in cases to which their employers are parties, both because the relation of employer and employee is intimate and confidential, and because it would be improper to place an employee in a position in which the honest exercise of his judgment may lead to the disruption of business relations on which he is dependent for his daily bread: *Central R. R. v. Mitchell*, 63 Ga. 173; *Louisville etc. R.R. v. Mask*, 64 Miss. 738. Hence the clerk of a party cannot be permitted to act as a juror in a cause in which he is a party: *Hubbard v. Rutledge*, 57 Miss. 7. But it has been held that an employee of a share-holder in a corporation, party to the action, is not subject to challenge on that ground: *Frederickton Boom Co. v. McPherson*, 2 Hann. 8. Former employment of the juror by one of the parties does not constitute a disqualification: *East Line R. R. v. Brinker*, 68 Tex. 500. The relationship of attorney and client is ordinarily so close and confidential that it seems incompatible with either performing the duties of juror for the other. It was held, however, in *Regina v. Geach*, 9 Car. & P. 499, that the fact that the juror was a client of the prisoner, who was an attorney, was insufficient to sustain a challenge by the prosecution.

BEING SURETY FOR A PARTY ON ANY OBLIGATION indicates a strong bias for him, and is generally sufficient to sustain a challenge on that ground: *Bradshaw v. Hubbard*, 1 Gilm. 390. If the suretyship relates to the claim in suit, so that the result of the judgment might be to subject the juror to liability, he is disqualified on the additional ground of interest in the litigation: *Ferriday v. Selser*, 4 How. (Miss.) 506. "Bail stand in a relation of trust and confidence to the principal, have over him powers not conferred on any other species of sureties; and, of itself, this relation imports confidence in

and favor to the principal," and disqualifies such bail from sitting as jurors in their principal's cause: *Brazleton v. State*, 66 Ala. 96; *Anderson v. State*, 63 Ga. 675.

A PARTNER MUST BE EXCUSED, if challenged, from acting as a juror in an action by or against his copartner, both because the relation implies unusual trust and confidence, and the result of the action may affect the business of the firm and ultimately lead to its dissolution: *Stumm v. Hummel*, 39 Iowa, 478. In *Commonwealth v. Joliffe*, 7 Watts, 585, it is said that one summoned as a witness for either party is disqualified to act as a juror in the same case; but this does not seem to be reasonable, unless he, as a matter of fact, has some knowledge which might make his evidence material. A juror is not subject to challenge on the ground that he is a tenant in common of real estate with the prosecutor, whose note is alleged to have been forged: *Patterson v. State*, 48 N. J. L. 381; nor because he is a director in a life insurance company, another life insurance company being a party to the action, unless the two companies have both issued policies on the life of the same person for whose death the present action is brought: *Craig v. Fenn*, Car. & M. 43.

MERE SOCIAL RELATIONS existing between the juror and one of the parties to the action has never, so far as we know, been deemed a sufficient ground to sustain a challenge. Thus it is not sufficient ground for a new trial to show that a juror, notwithstanding he disclaimed intimacy with the party, was in fact intimately acquainted with him, there being no evidence to show that this close acquaintance had resulted in any special bias in favor of the party: *Moore v. Cass*, 10 Kan. 288. So it is no objection to a juror that he has expressed sympathy with the family of the prisoner on trial: *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711; or that the juror and one of the parties are stockholders in the same corporation: *Brittain v. Allen*, 2 Dev. 120. A juror has been said to be incompetent if he has drank or eaten at the expense of a party since the commencement of the action: Ca. Litt. 157; 1 Chitty's Crim. Law, 542; Proffatt on Jury Trial, 177. We cannot assent to the view that this of itself constitutes an absolute disqualification, though it doubtless invites inquiry on the part of the adverse party for the purpose of ascertaining whether such eating or drinking was either the cause or the result of such a state of feeling between the juror and the party as indicates undue partiality of the former for the latter. Undoubtedly, in all cases where social relations are shown to exist between a juror and the party, it is proper for the court to permit an examination for the purpose of ascertaining whether there is any special bias in the mind of the juror for or against the party, and thus enabling the court to determine whether a challenge for cause can be sustained, and also of assisting the parties to the action in deciding whether the party is a proper one against whom to exercise the right of peremptory challenge.

THE FACT THAT A JUROR IS A MEMBER OF THE SAME BENEVOLENT OR SOCIAL ORGANIZATION has been relied upon as a ground of challenge, but very rarely with success. The question has been discussed at considerable length, and with great ability, in cases in which the right of a Mason to sit as a juror in an action to which a brother Mason was a party was involved. But the challenge was denied in one of these cases, in which the evidence before the triors disclosed that the oath taken by the Mason contained a clause "that he will aid and assist a companion Royal Arch Mason when engaged in any difficulty, and espouse his cause so far as to extricate him from the same, if in his power, whether he be right or wrong." But the witnesses

testified that the oath was explained as follows: "That if the brother were engaged in a difficulty or quarrel with any one else, it was his duty to separate them if possible, without inquiring whether the quarrel was right or wrong on his part, and that he did not consider that the oath in any manner prejudiced or affected a Mason when acting as a juror." In sustaining the action of the triors in determining that the juror was not disqualified, the court said: "The objection to Griswold and Lull as jurors is the same, and it takes the broad ground that a Master Mason is incompetent to sit as a juror in a cause wherein one of the parties belongs to the fraternity of Free Masons. The authority of Blackstone is quoted to prove that the juror being of the same society or corporation is enough to exclude him. Mr. Justice Blackstone cites no authority for the *dictum*, but I have elsewhere seen Finch's law cited as authority for the whole paragraph; and the reason assigned for excluding as jurors all persons within the ninth degree, all who have been arbitrators in the same matter, or a juror in the same cause, etc., is, because the cause of challenge assigned carries with it, *prima facie*, evident marks of suspicion, either of malice or favor. Is it true that persons belonging to the same society or corporation are *ipso facto* prejudiced in favor of every person belonging to the same society or corporation, so that they cannot decide a question of fact impartially between them and other persons? Whatever may have been the state of society in the days of Finch and Blackstone, it is not so now. This rule would exclude every stockholder in the same bank, every member of the same church, and every associate of the same benevolent society. We have many societies in which the members are extremely numerous, who have never heard of each other, and can have no inducements to favor persons who may belong to the same society, in preference to other individuals. The society of Free Masons is supposed to be as numerous as any, — the members spreading over Europe and America, embracing many thousands. Are all these persons so biased in favor of the members of that society that they cannot find the fact truly from evidence to be produced before them, whether in an action of slander the defendants spoke the words charged in the declaration? I will not say that there may not be cases where this rule is properly applicable, but there surely is no reason for its application in this case. Nor do I see anything in the oath of a Master Mason, as set forth in the challenge, which should create a disqualification. The defendant's counsel has referred to those parts of the obligation in which the Master Mason swears that he will apprise a brother of all approaching danger, if in his power; and the clause in which he swears that he will be aiding and assisting all poor indigent Master Masons, their wives and orphans, wheresoever dispersed around the globe, etc. These clauses enjoin the duty of benevolence and charity, but surely contain no evidence of bias or partiality in favor of brethren, or prejudice against others in matters of litigation": *Purple v. Horton*, 13 Wend. 9; 27 Am. Dec. 167. To the same effect is *Burdine v. Grand Lodge*, 37 Ala. 478.

A CHURCH MEMBER IS COMPETENT to try an action against another church member, or against a church of the same denomination of which he is not a member: *Barton v. Erickson*, 14 Neb. 164; but he is incompetent if the action relates to the property of a church of which he is a member: *Cleague v. Hyden*, 6 Heisk. 73; or in a criminal prosecution against a fellow church member for the doing of an act which is sanctioned by the doctrines of the church, as where a member of the Mormon church is prosecuted for polygamy, and a member of the same church, believing its doctrines with respect to polygamy, is also called as a juror: *United States v. Miles*, 2 Utah, 19.

MEMBERS OF ASSOCIATIONS FORMED TO SUPPRESS CRIME OR PROSECUTE CRIMINALS. — Some difference of opinion seems to exist with respect to the qualification of a member of an association or society formed for the purpose of detecting, prosecuting, and punishing criminals, to act as a juror in the prosecution of a person accused of a crime of the class which the association has been formed to detect and punish. We think the weight of authority is in favor of the proposition that the juror is not incompetent: *Boyle v. People*, 4 Col. 176; 34 Am. Rep. 76; *Commonwealth v. Thresher*, 11 Gray, 55; *Commonwealth v. O'Neil*, 6 Id. 343; *State v. Wilson*, 8 Iowa, 407; *Musick v. People*, 40 Ill. 268; *State v. Hoaxie*, 15 R. I. 1; 2 Am. St. Rep. 838; *Williams v. State*, 3 Ga. 453; *Parker v. State*, 34 Id. 262; *United States v. Noelke*, 17 Blatch. 554; *United States v. Hanway*, 2 Wall. Jr. 139; *Heacock v. State*, 13 Tex. App. 97; *Commonwealth v. Livermore*, 4 Gray, 18; unless the objects of the association, or the circumstances disclosed, indicate a hostility to the person on trial as an individual, or to all persons of his race, faith, class, or nationality: *People v. Reyes*, 5 Cal. 347. In the recent case of *Commonwealth v. Moore*, 143 Mass. 136, 58 Am. Rep. 128, it appeared that a person called as a juror was a member of "the Law and Order League of New Bedford, where the offense charged in the complaint is alleged to have been committed"; that the league was formed for the enforcement in New Bedford of the laws against the illegal sale of intoxicating liquors, and for the prosecution of liquor-sellers, and that certain agents of the league had induced the defendant to violate the law in order that he might be prosecuted for such violation. The court held the juror disqualified, saying: "It is difficult to see that such a juror was so indifferent, so disinterested and unbiased, that he could regard his agent, whom he had employed through his association, 'with great caution and distrust' as a witness. These considerations as to his credit he had already passed upon and determined when Giquel had been selected as agent of the association of which he was a member. But it is not necessary to go to the extent that the agent of the association was appointed for the purpose of inducing the defendant and others to violate the law. It is sufficient that it appeared that the complainant, Giquel, was employed by the association of which the juror was a member to enforce the laws in New Bedford against the illegal sale of intoxicating liquor, and to prosecute liquor-sellers in that city. He thus became the agent of the juror as well as of the other members of the association. Whether or not he was to appear as a witness at the trial is immaterial in the view we take of the case. The complaint which the juror was to try was originated by his agent appointed for the purpose of making such complaints. He could not be indifferent as to the result of that prosecution. He could not sit unbiased in determining the guilt or innocence of the defendant upon a complaint instituted by the juror's authorized agent." And in the previous case of *Commonwealth v. Livermore*, 4 Gray, 18, the same court had said: "We deem it to be our duty, however, to say that, in our judgment, the members of any association of men combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purposes, cannot be held to be indifferent, and therefore ought not to be permitted to sit as jurors in the trial of a cause in which the question is, whether the defendant shall be found guilty of violating the law."

That with respect to which the member of an association organized for the purpose of detecting and punishing persons who are guilty of crime is manifestly not indifferent is the execution of the laws and the punishment of their violators. But this, we think, is exactly the kind of indifference which

ought not to be sought in jurors. Jurors ought rather to be persons who are desirous that the laws should be executed and their offenders punished; and therefore, a juror who merely has this general respect for the law, or who has even much more respect for it than the majority of his fellow-men, ought not to be regarded as disqualified to try a criminal prosecution. The following language of the supreme court of Illinois in the case of *Musick v. People*, 40 Ill. 272, is forcible and convincing: "It is also urged as a ground of reversal, that a number of petit jurors belonged to an association organized for the purpose of detecting and prosecuting horse-thieves. Plaintiff challenged them for that cause, but the court refused to allow the exception. All persons have the right to be tried by a fair and impartial jury, and the mind of each of its members should be free from bias or prejudice. But does the fact that persons belong to an association whose object is to detect crime raise a presumption that they are prejudiced against a person charged with a criminal offense, or that they would not be able to give him a fair and impartial trial? We think that it raises no such presumption. In one sense, all persons living under a civilized form of government are members of such an association. The very object of all government is to protect individuals in their rights, and to punish persons who invade such rights. And every citizen who pays a tax contributes money to aid in convicting persons guilty of crime, and all persons are liable to be compelled to devote time to effect the same end. It is for this that jurors and witnesses are required to attend courts of justice. One juror admitted that he was prejudiced against persons guilty of stealing horses, but not more so than against persons who committed other crimes. In making this admission we do not see that he differs from other honest men, and we think that these facts did not disqualify him from serving on the jury. Had he stated that he believed that accused was guilty, or that he entertained a prejudice against him, it would have been otherwise. There was no error in allowing the juror to sit in the case."

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

BAXTER v. DAY.

[78 WISCONSIN, 27.]

INTERPLEADER — “**SAME DEBT.**” — Defendants in an action for the purchase price of personal property sold have no right to interplead persons who claim to have a title to the property adverse to that of the plaintiff, under section 2610 of the Revised Statutes of Wisconsin, which provides that a defendant, against whom an action is pending upon a contract, may apply for an order substituting in his place a person, not a party to the action, who “makes against him a demand for the same debt.”

ACTION by Augustus Baxter to recover the purchase price of logs sold by him to the defendants, J. F. and R. V. Day, from land recently purchased by the plaintiff. The defendants conceded that the price had not been paid, but gave as a reason that certain persons, Hale and Shipley, claimed to have bought the logs from one Baker, and had demanded payment for the same from the defendants. The defendants, upon affidavits and answer showing these facts, moved the court for an order making Hale and Shipley parties defendant in their stead, and that, upon their paying into court the amount claimed by the plaintiff, they be discharged from all further liability in this action. The motion was denied, and the defendants appealed.

Thomas Lynch, for the appellants.

W. F. White, for the respondent.

CASSODAY, J. If the defendants were entitled to have Hale and Shipley made parties defendant in the place of them—

selves, then it was by virtue of section 2610, Revised Statutes, as amended by chapter 41, Laws of 1883. The clause of that section which may be urged as applicable with most plausibility is this: "A defendant against whom an action is pending upon a contract, or for specific real or personal property, or for the conversion thereof, may, at any time before answer, upon affidavit that a person, not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order." This is not an action "for specific real or personal property, or for the conversion thereof." It is, however, an action "upon a contract." But in such an action, the defendant has no right to such interpleader, unless "a person, not a party to the action, makes against him a demand for the same debt." Hale and Shipley have made no claim to the contract price of the logs which the defendants agreed to pay the plaintiff. Their claim, if any, is based upon their alleged ownership of the logs. Their remedy, if any, is manifestly to replevy the logs, or in an action for their wrongful conversion. In neither action could they make "a demand for the same debt" which this action is brought to recover. The case is not, therefore, within the statute.

The order of the circuit court is affirmed.

INTERPLEADER. — INTERPLEADER WILL NOT BE COMPELLED, WHERE THE DOUBT AS TO WHICH OF TWO PERSONS IS LIABLE DOES NOT OCCUR FROM UNCERTAIN OR UNKNOWN FACTS, AND THE ONLY QUESTION IS, WHAT IS THE LAW APPLICABLE TO THE CONCEDED FACTS? *Board of Supervisors etc. v. Alford*, 65 Miss. 63; 7 Am. St. Rep. 637, and note 639, as to when a bill of interpleader will lie. As a general rule, a defendant, seeking relief by way of an interpleader, must not have incurred any independent liability to either rival claimant, yet the mere fact that a contract relation existed with the plaintiff will not necessarily deprive the defendant of the right to such relief: *Bechtel v. Sheaffer*, 117 Pa. St. 555. Where B. sued M. on a promissory note executed to L. by M., and by L. alleged to have been indorsed to B., and L. appeared and denied the ownership of B. in said note, and averred that he (L.) was the owner thereof, and asked to be made a party, it was error to refuse his request, and deny him the privilege of filing his answer: *Holland v. Commercial Bank etc.*, 22 Neb. 585.

WILL OF O'HAGAN.

[73 WISCONSIN, 72.]

WILL — ATTESTATION CLAUSE — PRESUMPTION. — Attestation clause, reciting that the witnesses signed in the presence of the testator, raises a strong presumption of that fact, which can be overcome only by clear and satisfactory proof to the contrary.

APPEAL from an order admitting a will to probate. The facts are stated in the opinion.

Cornelius Buckley, for the appellant.

J. G. Wickhem and B. M. Malone, for the respondent.

LYON, J. Daniel Riordan, the respondent in this appeal, presented to the county court, for probate, an instrument in writing purporting to be the last will and testament of Peter O'Hagan, deceased, in which he devised and bequeathed all of his estate, real and personal, to his wife, Letitia O'Hagan. The instrument purports on its face to have been executed in the form required by the statute, and was attested in due form by J. A. Sherwood and P. Johnson. Probate of the instrument was opposed by the appellant, Joseph A. O'Hagan, a son of the testator by a former wife. The county court admitted the instrument to probate as such last will. The appellant, Joseph A. O'Hagan, thereupon appealed to the circuit court. After a hearing in that court, the order of the county court was affirmed. The contestant, Joseph A. O'Hagan, appeals to this court from the judgment of affirmance rendered by the circuit court.

The only question raised on this appeal going to the merits of the controversy is, Did the attesting witnesses to the will subscribe the same as such in the presence of the testator, as required by statute? R. S., sec. 2282.

The will is in the handwriting of E. P. King, Esq., of Beloit, in which city the testator resided when the same was executed. It bears date September 12, 1881. There is no question but that it was signed by the testator and by the two persons whose names appear thereon as attesting witnesses. It is understood that Mr. King died before the testator. After the signature of the testator, and before those of the attesting witnesses, is the following certificate: "The above instrument, consisting of one sheet, was, on the day of the date thereof, signed, published, and declared by the said testator to be his

last will and testament in the presence of us who have signed our names, at his request, as witnesses, in his presence and in presence of each other." Both the attesting witnesses were examined as witnesses on the hearing in the circuit court, and each disclaimed any recollection of attesting the instrument, yet each verified his signature thereto. The substance of the testimony of each of them is contained in that of the witness Sherwood, as follows: "I have no recollection of signing that instrument; not the least. I don't remember signing it. All I know is that it is my signature."

The theory of the defendant is, that at the date of the will, — September 12, 1881, — the testator was sick and unable to leave his house; and, because both of the attesting witnesses testified that they had never been in his house, they could not have been present when he executed the will, inasmuch as it must necessarily have been executed at his house. The testimony tending to show that the testator was seriously ill at the time is very inconclusive and unsatisfactory, depending, as it does, mainly upon the recollection of the witnesses of what transpired on a specific day six years before they were called to testify. Besides, they fail to disclose any facts or circumstances which would have a tendency to impress the precise date upon their recollections. The testimony of the appellant himself is a fair specimen of that of the other witnesses on the same subject. He had testified to having been at the testator's house, September 15, 1881, and that the testator was then very ill. When interrogated as to his means of knowing the precise date, he said: "I am able to say that it was the 15th that I was at my father's, because I was building a house at the time. I have the papers to show." No papers were produced. The testimony tending to prove that the testator was able to go to Mr. King's office, in Beloit, on September 12th, is fully as strong and convincing as the testimony to the contrary. It is deemed unnecessary to state the testimony more fully.

In the case of *Will of Jenkins*, 43 Wis. 610, and *Will of Meurer*, 44 Id. 392, 28 Am. Rep. 591, it was held that, to authorize the probate of an instrument propounded as a will, it is not absolutely necessary that the attesting witnesses testify to all the facts essential to a valid execution of the will. In the *Jenkins* case, one of the attesting witnesses testified to the absence of at least one of those essential facts, yet it was held that such testimony did not necessarily defeat the probate of

the will. In *Will of Lewis*, 51 Wis. 101, the rule of those cases was reasserted; and again in *Allen v. Griffin*, 69 Id. 529.

In the *Lewis* case the contention was that the attestation was made before the testator signed the instrument. One of the attesting witnesses in effect so testified. In the opinion it was said: "The instrument is attested as a will in due and usual form. Such attestation is of itself not only *prima facie* evidence that the instrument was properly executed, but it raises a strong presumption that it was so executed. Had the witnesses deceased before the probate of the instrument, mere proof that the attesting signatures were their handwriting would have established the will; and the rule would be the same although the signatures of the witnesses were not preceded by any attesting clause or certificate. To defeat probate, the strong presumption of regularity thus appearing upon the face of the instrument must be overcome by proof: *Remsen v. Brinckerhoff*, 26 Wend. 325; 37 Am. Dec. 251; *Ela v. Edwards*, 16 Gray, 91; 1 Greenl. Ev., sec. 126; *Burling v. Paterson*, 9 Car. & P. 570. In view of this presumption, and considering also the infirmity of human memory, it seems most reasonable that a will purporting on its face to be legally executed should not be defeated on any doubtful or inconclusive parol proof that it was not legally executed. The opposite rule would greatly imperil the testamentary right; for under such a rule almost any will might be defeated by the dishonesty or imperfect memories of the attesting witnesses. Hence, in the present case, if the fact that the witnesses subscribed the instrument before the testator defeats the probate thereof as a will of the testator, the fact should not be found, against the presumption of regularity, without very clear and convincing proof."

A similar question was presented in *Allen v. Griffin*, 69 Wis. 529. In that case the proofs of irregular attestation were as strong as they are here. In the opinion by Mr. Justice Taylor it is said: "To reject the probate of a will upon such evidence as was offered in this case, on the ground that it does not conclusively appear that the witness signed as such after the signature of the alleged testatrix, would jeopardize the probate of very many honest wills. We think, in the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first."

The learned counsel for the appellant in his brief asserts

quite positively that the rule laid down in the Lewis will case is but a mere *obiter dictum*. We must assure the counsel that in our opinion he is mistaken. But however that may be, we must apply the rule to this case, and it certainly is not *obiter dictum* here. We find in this case no such clear and satisfactory proof that the will was attested in the absence of the testator as will justify the reversal of the finding that it was attested in his presence, or which would support a contrary finding had one been made. In other words, the presumption arising from the attestation and the attesting clause to the effect that it was subscribed by the witnesses in the presence of the testator is not overcome by proof. Hence the instrument was properly probated as the last will and testament of Peter O'Hagan.

Exceptions are preserved in the record to the rulings of the court admitting certain testimony against the objections of the appellant, and rejecting certain other testimony upon objections by the respondent. Without stating these in detail, it is sufficient to say of them that if all the testimony so objected to by appellant had been rejected, and all the testimony thus ruled out had been received, the result would not have been changed.

On the hearing in the circuit court, the appellant submitted several questions of fact, and requested the court to find thereon. The substance of these questions is, At what place in the city of Beloit did the testator execute, and the attesting witnesses subscribe, the instrument? Was the testator able to leave his house September 12, 1881? and did he do so? We think no such specific findings were necessary. The circuit judge found that the instrument was executed by the testator in the city of Beloit on the day it bears date, and was at the same time subscribed by the attesting witnesses in his presence. The finding is sufficiently specific.

The judgment of the circuit court is affirmed. The appellant must pay the costs of this appeal.

A motion by the appellant that the judgment be modified by allowing the costs of the appellant in this court to be paid out of the estate was denied January 29, 1889.

WILLS. — THE SIGNING AND ACKNOWLEDGING OF A WILL BY THE TESTATOR IN THE PRESENCE OF WITNESSES should be inferred, when the attesting clause is in due form, and it is shown that the witnesses were called into the room where the testator was to witness it, that they went to the

table to witness it, and went away supposing they had done so; that the draughtsman of the will also supposed they had done so; that the testator left town with the same impression; that the will was signed by the testator, and the attesting clause by the witnesses: *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220. Where a will has been duly executed, and the testator had sufficient testamentary capacity to make a will, the presumption is that it was executed freely, and without fraud or mistake, and the burden of proof to show the contrary rests on the party opposing the probate of the will: *Rockwell's Appeal*, 54 Conn. 119.

JACOBSON v. LANDOLT.

[73 WISCONSIN, 142.]

INTERVENTION BY ATTACHMENT CREDITOR IN ACTION TO DISSOLVE PARTNERSHIP — VACATING APPOINTMENT OF RECEIVER. — One who attaches partnership property in the hands of a receiver, appointed in an action for the dissolution of the partnership, has a right to intervene in such action for the purpose of asserting his lien under the attachment, and may attack the validity of the appointment of the receiver by a petition setting forth the facts upon which he relies, but he cannot attack such appointment in a summary proceeding by motion.

APPEALS by Neils Jacobson from orders denying appellant's motions. On January 16, 1888, William H. Landolt commenced an action for a dissolution of partnership and appointment of a receiver against James W. Vail, and on the same day a receiver was appointed. On January 17, Neils Jacobson commenced an action against the partnership, and attached certain of the partnership property. Thereafter Jacobson moved for leave to intervene in the partnership action, and to vacate the order appointing the receiver. On March 7, 1888, pending the hearing of this motion, an order was made in the partnership action, which provided that "all persons who claim to have any liens upon or special rights in any property in the hands of the receiver, and may desire to do so, may present their respective claims to this court by petition duly verified, serving a copy of the petition on the attorneys for the receiver; that the receiver have leave within twenty days to answer the same, and the same may thereupon be heard in this court, or as the court shall direct." On March 28th the court denied Jacobson's motion. Jacobson subsequently made a motion to be admitted as a party in the partnership action, and to vacate the order of March 7th. On May 8, 1888, the court made an order denying this motion. Jacobson appealed, first, from the order of March 28th, and second, from the order of May 8th.

W. J. Turner and W. H. Timlin, for the appellant.

Winkler, Flanders, Smith, Bottum and Vilas, and H. C. Sloan, for the respondent.

LYON, J. The rules of law upon which these appeals must be determined are not difficult, and may be very briefly stated. The appellant, Jacobson, who claims a special lien upon a portion of the copartnership property in the hands of the receiver, has the right to intervene in the partnership action for the purpose of asserting such lien. But inasmuch as the property came into the hands of the receiver before he levied his attachment upon it, in order to successfully assert his claim and lien thereupon, it seems necessary that he should obtain a vacation of the order appointing the receiver. Hence he is entitled to some appropriate proceeding to attack the validity of such appointment. But a summary proceeding by motion is not the appropriate method of making such attack. This can only properly be done upon the petition of the party interested setting forth the facts upon which he relies to obtain a vacation of the appointment. To such a petition the receiver, who is the officer of the court, and represents all parties adversely interested, may interpose an answer, and take issue upon any of the facts stated in the petition. The issue thus made is to be determined in the regular course of judicial procedure by a trial thereof, and a determination of the material facts involved. The order of March 7, 1888, provides that "all persons who claim to have any liens upon or special rights in any property in the hands of the receiver, and may desire to do so, may present their respective claims to this court by petition duly verified, serving a copy of the petition on the attorneys for the receiver; that the receiver have leave within twenty days to answer the same, and the same may thereupon be heard in this court, or as the court shall direct." This order gives Jacobson, as well as all orders similarly situated, the right to intervene in the partnership action, and to litigate therein any and all questions affecting his right to a paramount lien upon the property attached by him. It is scarcely necessary to add that nothing in the orders appealed from is *res adjudicata* upon any of the questions thus put in issue by the petition and answer.

Both of the orders appealed from were made after the order of March 7, 1888, and they deny the right of Jacobson to intervene. These orders, while in force, may be, and probably

are, a modification of the order of March 7th, operating to except Jacobson from that order, and bar his right to intervene in the action. For this reason, that part of each of those orders which denies leave to Jacobson to intervene in the partnership action is erroneous.

For the reasons above stated, that portion of the order of March 28, 1888, first appealed from, which denies the motion to vacate the order appointing a receiver, was properly denied. That portion of the order of May 8th, from which the second appeal was taken, which denies the motion to vacate the order of March 7th, must also be affirmed, because the appellant could not be heard to make the motion before leave was granted him to intervene in the action, and because, in the condition the action then was, the order appears to have been a proper one, and regularly made.

Our conclusions are, therefore, that so much of each of the orders appealed from as denies to Jacobson the right to intervene in the partnership action must be reversed, and the residue of each of such orders must be affirmed. Each party must pay his own costs.

Ordered accordingly.

ATTACHMENT AND GARNISHMENT. — AN ORDER MADE BY A COURT AFTER JUDGMENT IN AN ATTACHMENT SUIT cannot be attacked collaterally: *Union Pac. R'y Co. v. Smerah*, 22 Neb. 751; 3 Am. St. Rep. 290.

STUTZ v. CHICAGO AND NORTHWESTERN R'y Co.

[73 WISCONSIN, 147.]

DAMAGES — PERSONAL INJURIES — FREIGHT. — Passenger may recover for fright sustained, in an action against a railroad company for damages caused by the wrongful act of the conductor in directing her to leave the train at a place of danger, where the conductor, knowing the danger, directed her to leave the train in the night-time at a place several hundred feet from the platform of the depot of her destination, and she was thus compelled to walk along a side-track, in which there was an open culvert, into which she fell and was injured, and while endeavoring to extricate herself, she was frightened by the backing of trains on the track towards her.

PRACTICE — REVERSAL — ERROR NOT PREJUDICIAL. — Appellate court will not reverse a judgment for error of the lower court in permitting a witness to be questioned on cross-examination as to matters not inquired of on the direct examination, and to be afterwards contradicted as to such matters, where they were merely collateral, and it is not apparent that the error could have any influence with the jury upon the issues of fact found by them.

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DAMAGES — PERSONAL INJURIES — EVIDENCE AS TO EXTENT OF INJURIES. —

Evidence is admissible in an action by a married woman to recover damages for personal injuries caused by the wrongful act of the defendant, as tending to show the extent of the injuries, that by reason thereof she was unable to perform her work as she had previously done.

Id. — FUTURE SUFFERING. — It is proper to instruct the jury, in an action to recover damages caused by the wrongful act of the defendant, that the plaintiff is entitled to recover for any further physical suffering which, from the evidence, is reasonably certain to result from the injury, where there is evidence tending to show that the plaintiff had not, at the time of the trial, fully recovered from the injuries sustained.

PRACTICE — SETTING ASIDE VERDICT AS EXCESSIVE. — Appellate court will not set aside a verdict as excessive, unless it is clearly apparent from the evidence that the jury were actuated by passion or prejudice, the trial court having refused to interfere on that ground.

ACTION by Bertha Stutz against the Chicago and Northwestern Railway Company, for personal injury to the plaintiff, alleged to have been caused by the negligence of the railway company. The material facts in the case are, that on the evening of March 4, 1886, the plaintiff and a Mrs. Kreuziger took passage in the caboose of a freight train, from Juneau to Minnesota Junction. When the train drew near the junction, it stopped so that the caboose in which the plaintiff and her companion were riding was several hundred feet south of the depot platform. The night was dark, and the evidence tended to show, and the jury found, that the conductor of the train told the plaintiff and her companion that they must leave the car at that place; and by leaving the car at that place, it was necessary for them to alight on the right-hand side of the car, and walk up along a side-track several hundred feet to reach the highway they would take in going to their homes. This fact was well known to the conductor; and it was also well known to him that where the side-track crossed the highway there was an open culvert across the track. Of this the plaintiff had no knowledge. The side-track was raised above the surface of the ground, and was the only way for reaching the highway from the place where they left the car. The plaintiff had some bundles in her hands, and when she got off the train, proceeded up the side-track, and fell into the culvert and injured her knee. While in the cattle-guard, and struggling to extricate herself, the men in charge of the train switched some cars on the side-track. She noticed the fact that cars were being placed on the side-track, and became greatly excited and frightened by their approach. The cars, however, did not come nearer than one hundred feet of the cattle-guard, and the

plaintiff extricated herself and proceeded on her way home. For the injury resulting to her by being wrongfully directed to leave the car, and falling into the culvert, the plaintiff claims damages, alleging that the defendant company was negligent in directing her to leave the cars at the place mentioned. The jury found the material issues in favor of the plaintiff, and assessed her damages at one thousand dollars. From the judgment entered on the verdict the defendant appeals.

Winkler, Flanders, Smith, Bottum and Vilas, and C. H. Van Alstine, for the appellant.

E. P. Smith and J. E. Malone, for the respondent.

TAYLOR, J. Upon the facts of the case as found by the jury there is no contention on the part of the learned counsel for the appellant that the plaintiff was not entitled to a verdict for some amount of damages. The errors relied upon for a reversal of the judgment are exceptions taken to the admission of evidence, to the instructions of the court to the jury, and a refusal to give an instruction requested by the appellant.

It is insisted that it was error to permit the plaintiff to give the following evidence: "How long were you in there?" (meaning the culvert). "O, I could not tell,—I was so full of fright; at last, I helped myself out." "What were you frightened about?" Objected to; overruled; exception. A. I was afraid the cars were switching back on me." "How did you go home?" A. "Full of fright." It is claimed by the learned counsel for the appellant that the plaintiff is not entitled to recover damages on account of the fright which she experienced by reason of the backing of the cars towards her upon the side-track, and that the refusal of the court to so charge was error.

Upon the subject of damages, the trial judge instructed the jury as follows: "She is entitled to such amount of damages as, in your judgment, will compensate her for all the physical injuries directly resulting from the negligence complained of, as well as the mental suffering resulting therefrom. This does not include punitive damages, but does include such pain and suffering of body and mind as you find, from the evidence, she has suffered from the negligence of the defendant, and without her fault, and which is directly the result of such negligence. . . . If you find the plaintiff is entitled to recover, say, from all the evidence, how much will compensate her for all the injuries sustained, the pain and suffering

caused by the negligence complained of, if you so find; if you find it was the direct result thereof," etc. "The plaintiff, if she is entitled to recover, is entitled to full compensatory damages for all the direct physical injury, as well as the mental suffering you may find, from the evidence, resulted from the injury caused by the negligence complained of." "By compensatory damages we mean such damages as, in your judgment, will be a reasonable compensation to the plaintiff for all the pains and suffering in the past, resulting from the accident, and also any future suffering therefrom which, from the evidence, you may find is reasonably certain to result from said injury." These instructions were separately excepted to by the appellant. The appellant also requested the judge to instruct the jury as follows: "The plaintiff is not entitled to recover any damages on account of any fright which she experienced on account of the cars backing down towards her upon the side-track." This instruction was refused, and the appellant excepted.

It is argued by the learned counsel for the appellant that the authorities are quite uniform in holding that no action can be maintained for mere negligence on the part of the defendant, unaccompanied by insult, oppression, or indignity, which causes fright or other mental emotion only, and which does not result in injury to the person or the health of the plaintiff. And he therefore insists that it was error to allow the plaintiff to testify that she was frightened by the approach of the backing cars when she was in the culvert and struggling to extricate herself therefrom; and he also insists that the perils and dangers of the situation in which she was placed by the negligent act of the defendant cannot be considered in awarding her damages. We agree with the general proposition of the learned counsel that for a mere negligent act only compensatory damages can be recovered, and that such compensatory damages ordinarily include only damages for such mental suffering as arises from the personal injury received; and we may admit, for the purposes of this case, that when the only ground of action against the defendant is fright caused by the negligence of the defendant, which is not followed by any injury to the person or the health of the plaintiff, and in no other way affects her rights of person or property, no action can be maintained. We are of the opinion, however, that in this case and others of like character,—where the cause of action is not grounded upon mere fright or terror,

but upon the wrongful act of the defendant in putting her off the car in a place of danger, in the night-time,—in measuring the plaintiff's injury it is not only competent, but it becomes essential, to determine the extent of plaintiff's injury, that all the surroundings of the wrongful act of the defendant should be taken into consideration in order to render a just verdict. Certainly, it cannot be urged, with any show of authority or reason, that the same damages should be awarded to a plaintiff who is wrongfully put off a car in a terrible storm, several miles from any place of shelter, as should be awarded to one who is wrongfully put off at a station in a town or city, where he can readily get shelter and protection; nor that the same damages should be awarded to the person who is wrongfully put off the cars in the middle of a high bridge, in the night-time, where trains are constantly passing, and the person who is so put off at a pleasant station at mid-day. In all cases of this kind, the actual surroundings which accompany the wrongful acts are, and should always be, considered in estimating damages. This case does not present the question of the right to recover for mere mental suffering, independent of bodily or physical injury. Under the rule contended for by the learned counsel for the appellant, it would be equally improper to show that it was a dark night when she was directed to leave the car, and that she was compelled to walk along a raised side-track, on which cars were being switched, and which she was compelled to traverse in order to reach the highway leading to her home, as to show that she was frightened when struggling to escape from the culvert into which she had fallen, for fear of being run over by the approaching cars. Without stating that fact, the jury would have the right, in estimating her damages, to consider all the attendant dangers which surrounded and threatened her.

It is not pretended but that the agent of the company had full knowledge of all the dangers which surrounded the plaintiff when he directed her to leave the cars. The company cannot, therefore, say that these dangers were too remote, and that the terrorizing effect which they might have was one which could not have been anticipated by it. As before said, the conductor, who directed the plaintiff to leave the car when and where she did, knew that cars would be backed upon the side-track which he compelled her to travel upon; he knew the night was dark, and might reasonably be held to have

known that the backing of cars upon that track while plaintiff was on it would be a cause of alarm to her, whether she had fallen into the cattle-guard or not. The backing of the cars on the track was intimately connected with the wrongful act of the conductor; in a certain sense it was a part of the *res gestæ*, as much so as the darkness, the raised side-track, and the open culvert into which she fell. That the evidence was admissible, and proper to be considered by the jury, is, we think, supported by principle and authority: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364, 367; 92 Am. Dec. 133. In that case, the plaintiff was expelled from the car in the night-time, but on the trial gave evidence of no actual personal injury. On affirming the judgment, the court say: "It is also urged that, as the conductor acted in good faith, and without violence or insult, and there is no proof of actual damage to the plaintiff, the verdict should have been for only nominal damages. The verdict was for one hundred dollars. It was dark when this affair occurred, and the plaintiff was lame, and had two bundles that seemed to be heavy. In order to reach the station or village, he had to pass over a covered railway bridge which spanned a stream, and which had to be crossed by means of a plank or footpath about three feet wide laid down upon the timbers. The only light came from below, and from the ends of the bridge. For a stranger, laden with bundles, to be compelled to walk through a dark railway bridge on a narrow path, uncertain as to when a train may come, and liable to be crushed if one does come, is certainly not a desirable experience. The jury had a right to take these things into consideration," etc.

In *Seger v. Town of Barkhamsted*, 22 Conn. 290, which was an action against the town to recover damages for maintaining a defective bridge, the trial judge instructed the jury that if they found for the plaintiff, they had a right to consider all the circumstances of danger and peril attending the accident. To this instruction exception was taken, and on appeal, the supreme court held the instruction right, and made the following remarks in regard to it: "That the plaintiff is entitled to be compensated for his personal injury there is, of course, no question; and that principle is sufficient to vindicate the charge on this point. Such actual injury is not confined to wounds and bruises upon his body, but extends to his mental suffering. His mind is no less a part of his person than his body, and the sufferings of the former are oftentimes more acute, and also more lasting, than those of the latter. . . .

The dismay and consequent shock to the feelings which is produced by the danger attending a personal injury not only aggravate it, but are frequently so appalling as to suspend the reason, and disable a person from warding it off; and to say that it does not enter into the character and extent of the actual injury, and form a part of it, would be 'an affront to common sense.'" See also *Woolery v. Louisville etc. R'y Co.*, 107 Ind. 381; 57 Am. Rep. 114; *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759; *Canning v. Inhabitants of Williamstown*, 1 Cush. 451.

It must be remembered that in this case, and in all others of a similar character, the ground upon which the defendant is held liable for any damages is the wrongful act of the agent of the company in directing the plaintiff to leave the cars at the time and place designated, and not the fact that, after leaving the cars, the plaintiff fell into the cattle-guard, and was injured. That fact was only an aggravation of her damages she would have been entitled to recover had she received no personal injury; and in fixing the amount of the damages the plaintiff ought to recover, it seems but reasonable and just that all the circumstances of peril and danger which surrounded her at the time she was unlawfully directed to leave the cars must be considered, and that it was not error to direct the jury that, in assessing the damages, they might consider the fright which the plaintiff was subjected to by the unlawful act of the conductor. This case does not fall within the rule — if there be such a rule — that no recovery can be had for merely putting a person in peril when no personal injury results therefrom. The cases in which that rule has been laid down were all cases in which it was held that the defendant had not done any act which constituted a cause of action; and it does not apply to a case when the defendant has done that which constitutes a cause of action in favor of the plaintiff, and when the peril and fright are circumstances surrounding and attending the wrongful act of the defendant. We think the evidence objected to was properly admitted, and that there was no error in the instructions of the trial judge upon that question. The exceptions taken to the instructions given to the jury upon the question of damages were not insisted upon, on the argument, or assigned as error.

The fourth and fifth errors alleged relate to the cross-examination of the witness Askew, who was called for the defendant.

While we think the court should not have permitted the witness to be questioned on his cross-examination as to any matter not inquired of by the defendant on the direct,—or if permitted to do so, the court should not have allowed the plaintiff to contradict his answers,—we are of the opinion that this examination upon a collateral matter was not so material to the real questions at issue as to justify this court in reversing the judgment for such error on the part of the trial judge. It is not apparent that such error could have had any influence with the jury upon the issues of fact found by them on the trial.

The sixth alleged error is clearly not an error. It was clearly competent for the plaintiff to show by her evidence that the injury to her person was of such a character as to render her unable to perform her work after the injury as she had been able to do before. Although such evidence would be proper and competent in an action by the husband to recover for loss of service, it was also competent in this case as tending to show the extent of her injuries. The jury were instructed that she could not recover in this action "for loss of time."

It is also alleged that it was error to instruct the jury as follows: "She is entitled to recover for any further physical suffering which you may find from the evidence is reasonably certain to result from the injury complained of." It is said there was no evidence upon which to found an instruction of this kind. We think the record shows that there was evidence tending to show that the plaintiff had not, at the time of the trial, fully recovered from her injuries. There was sufficient evidence upon which to base the instruction.

The eighth error alleged as to the instruction given by the court becomes immaterial, as the jury found, in effect, that the conductor directed her to leave the cars at the place where she did leave them.

It is urged that the verdict is excessive, and should have been set aside for that reason. The trial court having refused to interfere on that ground, this court will not set aside the verdict for that reason, unless it is clearly apparent from the evidence that the jury were actuated by passion or prejudice. We do not think the evidence discloses any such reason for reversing the judgment in the case.

The judgment of the county court is affirmed.

EXEMPLARY DAMAGES. — Where injuries and sufferings were intended, or occur through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse, additional damages, termed "exemplary," "punitive," "vindictive," "compensatory," or "added" damages, may be given, agreeably to what would be right and just under the circumstances of each case: *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608, and cases collected in note 616. But injuries resulting from simple negligence only, as contradistinguished from gross negligence, are no ground for exemplary damages: *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354; *Hurt v. St. Louis etc. R'y Co.*, 94 Mo. 255; 4 Am. St. Rep. 374, and note 381. A railway company is liable for exemplary damages in case of injuries to passengers resulting from a violation of duty by one of its employees in the conduct of its train, if such violation is accompanied by oppression, fraud, malice, insult, or other willful misconduct evincing a reckless disregard of consequences; but indecorous conduct alone, even to a female passenger, is insufficient to authorize exemplary damages: *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600, and cases in note 604, for a company's liability in exemplary damages for the wrongful or grossly negligent acts of its conductor in charge of its train. Exemplary damages will not be allowed for a failure to stop a train at a station, and give a passenger opportunity to alight therefrom, unless the failure to stop was willful, or the wrong was aggravated in some manner by the railroad company or its employees: *Dorrah v. Illinois Cent. R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629, and note 631, as to exemplary damages for injury to feelings or mental suffering. But mental suffering is not an element of damages, unless based upon bodily injury, or unless the injury from which it results was attended by circumstances of malice, insult, or oppression: *Id.* And so damages may be recovered for mental suffering for injuries caused to one by negligence of the defendant, where mental suffering is an element of physical pain, or is the natural and proximate result of the physical injury: *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530, and extended note 534-537, on mental anguish as an element of damages. See note to *Austin v. Wilson*, 50 Am. Dec. 767-775, for general discussion upon exemplary damages; and note to *Hagan v. Providence etc. R. R. Co.*, 62 Id. 379-389, for liability of a master for exemplary damages for acts of his servant. A jury may or may not in their discretion give exemplary damages under the Kentucky statute, in an action to recover damages for death caused by willful neglect: *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135, and note 143. Though a corporation is liable in exemplary damages for injuries occasioned by the wanton and willful acts of its servants, yet where there is no evidence which would justify a finding that the wrongful, wanton, or willful act of the servant was the result of feelings of violence, outrage, or reckless indifference, the question of exemplary damages should not be submitted to the jury: *Philadelphia etc. Co. v. Orbann*, 119 Pa. St. 37.

RAILWAYS. — THE RAILWAY EMPLOYERS IN CHARGE OF A TRAIN must use reasonable care in putting persons off the train; and it is negligent conduct in an engineer, for which his employer is answerable, to direct a child to get off the engine while in motion, even though the child was wrongfully there: *Chicago etc. R'y Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380. But where one, in panic, leaps from a railway car in motion, and is injured, he cannot recover therefor in an action against the company, where such panic arose from causes with which it had no connection and in which it had

no agency: *Reary v. Louisville etc. R'y Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497.

RAILWAYS — DUTY OF THE COMPANY TO PASSENGERS. — Passengers, if required to leave the train at some place other than at the regular station, especially where the place is inappropriate and inconvenient, are entitled to care and attention such as to enable them to safely and properly reach the station: *New York etc. R'y Co. v. Doane*, 115 Ind. 435; 7 Am. St. Rep. 451, and note 457.

VERDICT — EXCESSIVE DAMAGES: See *Henry v. Sioux City etc. R. R. Co.*, 75 Iowa, 84; ante, p. 457, and note; *International etc. R. R. Co. v. Telephone & T. Co.*, 69 Tex. 277; 5 Am. St. Rep. 45.

DAMAGES FOR PERSONAL INJURY, WHAT IS THE MEASURE OF. — The age, the condition, the capacity of earning money, and the expectation of life should all be taken into consideration in admeasuring the damages to one who has suffered personal injuries: *Louisville etc. R. R. Co. v. Stacker*, 86 Tenn. 243; 6 Am. St. Rep. 840, and note 847. So, also, should be taken into consideration the nature of plaintiff's business and the value of his personal services: *Reeves v. Winn*, 97 N. C. 246; 2 Am. St. Rep. 287, and note 289; *Clapp v. Minneapolis etc. R'y Co.*, 36 Minn. 6; 1 Am. St. Rep. 629, and note 632; see also extended note to *Rowe v. Moses*, 67 Am. Dec. 562-568.

APPELLATE PRACTICE — HARMLESS ERRORS: See note to *Blanchard v. Lake Shore etc. R. R. Co.*, 126 Ill. 416; ante, p. 630. Where incompetent testimony is received, but the facts sought to be established thereby are not contradicted, and the cause was tried upon the theory that such facts were true, the admission of such evidence is a harmless error: *City of Kinsley v. Morse*, 40 Kan. 577. Where an instruction correctly stating the law applicable to a certain cause is refused, but the jury, by special verdict, find all the facts against the theory of such instruction so refused, the refusal to give such instruction was a harmless error: *Id.*; *Manufacturing Co. v. Nicholson*, 36 Id. 577.

WIGHTMAN v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[73 WISCONSIN, 169.]

PRACTICE — SPECIAL VERDICT — INCONSISTENT FINDINGS — DIRECTING JURY TO CORRECT VERDICT — POLLING JURY. — Court may decline to receive a special verdict the findings of which are inconsistent, and manifestly made under a misapprehension of the instructions, and after explaining the instructions previously given, direct the jury to retire for further consultation; and a request to poll the jury before they so retire is premature, and may be denied.

CARRIER OF PASSENGERS — ROUND-TRIP TICKET — ACCIDENTAL SEPARATION OF PARTS. — Round-trip railroad ticket, punctured for the purpose of separation into two parts, and having on the going part the words "Not good for passage," on a line with the words "if detached" on the returning part, is good for a passage where the parts have become accidentally separated, if they are in good faith both presented to the same conductor on the going trip.

ACTION to recover damages by reason of an alleged wrongful expulsion from the defendant's train. On April 15, 1886, the plaintiff purchased of the defendant at its depot in Elroy a round-trip ticket from Elroy to Wonewoc. One half of the ticket was white, and upon that half were the words and figures: "R. T.—Going. Elroy to Wonewoc, 9-8-86, 2563. Not good for passage." The other half of the ticket was red, and upon that were the words and figures: "2563, C. & N. W. R'y. R. T.—Returning. Wonewoc to Elroy. W. A. Thrall, Gen'l Ticket Agt. if detached." The words, "Not good for passage" were on a line with the words "if detached." On July 26, 1886, the plaintiff boarded, at Elroy, a caboose attached to one of the defendant's freight trains, on its way to Wonewoc. After the train had started from Elroy, the conductor in charge demanded fare of the plaintiff, who thereupon tendered the conductor the above ticket, which the conductor declined to receive. The plaintiff refused to pay fare, and the conductor stopped the train, caused it to run back to Elroy station, and compelled the plaintiff to leave. The evidence was conflicting as to whether the plaintiff presented the conductor the red half of the ticket as well as the white half when he first demanded fare, or not until after the train was stopped, and also as to some of the facts and circumstances attending the refusal of the conductor to receive the ticket, the refusal of the plaintiff to pay fare, and the ejecting of the plaintiff from the train. The jury returned a special verdict to the effect,—(1) that the plaintiff had the round-trip ticket from Elroy to Wonewoc and return given in evidence, No. 2563, on July 26, 1886, and above described; (2) that the plaintiff on that day entered the caboose of the defendant's freight-train, which carried passengers, at Elroy, for the purpose of being carried therein from Elroy to Wonewoc on said ticket; (3, 4) that said ticket was broken apart and separated at the place where punctured for the purpose of separation, before it was offered to the conductor for passage, (5, 6) but not by or with any carelessness or negligence of or on the part of the plaintiff; (7) that when the conductor first came to the plaintiff to collect his fare, the plaintiff produced and exhibited to him both the going and returning part of said ticket, (8) and not the going part only; (9) that the plaintiff did not omit to produce and exhibit to the conductor both parts of said ticket until after the conductor had stopped the train to back up to Elroy; (10) that the plaintiff left the train

by order of the conductor; (11) that the conductor refused to carry the plaintiff on said ticket, because it was not a good and valid ticket, (12) through an unintentional mistake on his part as to its validity; (13) that the plaintiff still holds said ticket, and both parts thereof, without having offered to return them to the defendant; (14) that the conductor called the plaintiff a liar before the plaintiff called him a liar; (15) that the plaintiff's damages are assessed at \$300; (16) that in estimating such damages they gave him \$299.54 for injury to his feelings. Thereupon the court ordered judgment for the plaintiff upon said special verdict for the sum of \$299.60, being the amount of damages assessed by the jury, less the sum of forty cents paid for the ticket, for which the court held that the plaintiff was not entitled to recover in this action. From the judgment entered thereupon accordingly the defendant appeals

Winkler, Flanders, Smith, Bottum and Vilas, and C. H. Van Alstine, for the appellant

F. S. Veeder, Duane Mowry, and B. C. Smith, for the respondent.

CASSODAY, J. When the jury first announced their verdict, the answer to the fifteenth question was three hundred dollars, and the answer to the sixteenth question was, in effect, nothing, instead of the amounts above stated. The court thereupon intimated to the jury that such findings were inconsistent with themselves; that the jury had failed to observe the instructions of the court; that by reason thereof they were at liberty to go to their room for further consultation; that if they meant to answer as they had indicated, then, when they came in, they should say so. Thereupon the counsel for the defendant asked to have the jury polled, to see if that was in fact their verdict; but the court declined, for the time being, to receive such verdict, until the jury should go to their room for consultation. The court thereupon indicated the nature of some of the instructions which had previously been given to them; that no opinion had been intimated to them as to whether they should find anything for injury to feelings or not; that that question was left entirely to them. The defendant's counsel thereupon requested the court to receive and record such verdict, which was refused, and the jury thereupon retired for further consultation. Upon returning into court, they answered the fifteenth question, forty-six cents,

and the sixteenth, three hundred dollars; and thereupon the court, for the same reasons, again refused to receive said verdict, and ordered the jury to again retire for further consultation, which they did; and thereupon they again returned into court with the verdict complete and substantially as found in the above statement of facts; and the same was thereupon received by the court, and entered of record. The jury had been told in the general charge, in effect, that if they found for the plaintiff, and that he was entitled to damages for injury to his feelings, then in answering the fifteenth question they should state the total amount of damages allowed, as for loss of time, which should be "simply nominal,—six cents" and damages for injury to his feelings, and the amount he paid for the ticket, in one general sum; and then, in answer to the sixteenth question, that they should "state what damages," if any, "he suffered for injury to his feelings." It is manifest that the jury misapprehended these instructions until their last consultation. The learned trial judge scrupulously avoided anything like dictation as to whether the jury should find in favor of the one party or the other upon any of those items, but merely insisted upon having the questions submitted determined by the jury with a correct understanding of the instructions which had been given to them on that subject. Such action was manifestly within the province of the court: *Fick v. Mulholland*, 48 Wis. 419; *State ex rel. White Oak Springs v. Clementson*, 69 Id. 628; *McMahan v. McMahan*, 53 Am. Dec. 482; *State v. Overton*, 61 Id. 671; *Work of the Advocate*, 676, and cases there cited. The request to poll the jury was before the verdict was thus perfected, and hence, as a peremptory right, was premature.

The several findings of the jury are all supported by the evidence. A railway company may, undoubtedly, make reasonable regulations for the safe and orderly conduct of its business, and to protect itself against impositions: *Plott v. Chicago etc. R. R. Co.*, 63 Wis. 511; *Mosher v. St. Louis etc. R. R. Co.*, 127 U. S. 390; 2 Am. & Eng. Ency. of Law, 759. But this does not authorize such company, under the guise of regulations, to abridge or impair a passenger's statutory or legal rights. The statute required the defendant, upon application "at its ticket-station" in Elroy, and payment of the price, to sell to the plaintiff "round-trip tickets, good for first-class passengers," from that station to Wonewoc and return: R. S., sec. 1803. It stands confessed that the defendant did

so sell and deliver to the plaintiff the ticket in question upon such application, payment, and purchase. It is, moreover, confessed that such ticket, in the condition it was at the time of purchase, entitled the plaintiff, at the time and place he did, to board the train in question, and ride thereon to Wonewoc, and thereafter to return therefrom to Elroy by any train stopping at those stations and carrying such first-class passengers. The only defense to this action for expelling the plaintiff from the train is the fact, as found by the jury, that the white portion of the ticket was broken apart and separated from the red portion, without any carelessness or negligence of or on the part of the plaintiff, at the place where punctured for that purpose, before it was offered to the conductor for passage. But the respective parts of the ticket were numbered alike, and each contained the letters "R. T.,"—the one having thereon, "Going. Elroy to Wonewoc"; and the other, "Returning. Wonewoc to Elroy." The jury, moreover, found that both parts of the ticket were produced by the plaintiff and exhibited to the conductor when he first came to the plaintiff to collect his fare, and that the plaintiff still held both parts of the ticket. Manifestly the two parts of the ticket belonged together, and had formerly been attached to each other. The plaintiff appears to have been unable to account for their separation, except that he had carried the ticket in his pocket for some months. The ticket was "punctured for the purpose of separation"; and, of course, with the expectation that it would be separated when first used. It is claimed, however, that the words "Not good for passage," on the going part of the ticket, and the words "if detached," on the returning part of the ticket, were, together, in effect, a stipulation that the ticket should be deemed forfeited if such parts should be separated by any other person than the conductor. But such are not the words of the contract, and if such is to be deemed its legal effect, then it is because such stipulation is to be implied from the words employed. Had the going part of the ticket alone been presented to the conductor, there might have been some force in the argument; for to allow that part alone to be used, unaccompanied by the other part, would have the effect to convert this "round-trip ticket" into two separate single-trip tickets, to be used promiscuously. That would permit the returning part to be used before the going part, and hence give to the holder a right not secured by the statute. The words "Not good for passage—if detached"


would seem to have been so placed upon the ticket to prevent imposition by a separation of the parts, and the use of each as a single-trip ticket. But where such parts of the ticket become separated by such inadvertence, and are then in good faith both presented together and at the same time to the same conductor on the going trip, the purpose of such words would seem to be as fully attained as though the two parts of the ticket had not previously been separated. In other words, the presentation to the conductor of the two parts of the ticket, under the circumstances found, is the same, in legal effect, as though such parts had not been detached when so presented.

It is to be remembered that the ticket was the mere evidence of the contract of carriage, and that such evidence consisted of two parts designed for separation. To imply such forfeiture of the contract from such mere inadvertent separation, under the circumstances found, when no word, letter, or figure on either part of the ticket was thereby obliterated, and when no perceivable injury to the defendant could result therefrom, would be to destroy a statutory right upon the merest technicality, and in the absence of a clearly expressed stipulation to that effect. Even a strict literalism is not to be so rigidly enforced as to defeat the manifest purpose of a contract under a statute. Whether a different rule should prevail where the passenger willfully, and against the protest of the conductor, separates the coupons or parts of a ticket, as in some of the cases cited, need not be here considered.

It follows that, upon the facts found, we must hold the defendant liable. Upon the whole record, and the repeated rulings of this court, we cannot say that the damages are excessive.

The judgment of the circuit court is affirmed.

SPECIAL VERDICTS. — IF THE FINDINGS OF THE JURY ARE CONTRADICTORY, No JUDGMENT can be rendered on the verdict, and if a judgment is entered upon such a verdict, a new trial will be ordered: *Porter v. Western N. C. R. R. Co.*, 97 N. C. 66; 1 Am. St. Rep. 272; *Wood v. McGuire*, 17 Ga. 361; 63 Am. Dec. 246. Where the evidence is insufficient to enable the jury to answer special interrogatories in the affirmative, negative answers should be given in clear and concise language, and where such answers are so uncertain and evasive that it cannot be determined whether they accord or conflict with the general verdict, they will not be allowed to stand: *Fisk v. Chicago etc. R'y Co.*, 74 Iowa, 424. The answer by a jury of "don't know," to special questions submitted to them, when the evidence is amply sufficient to arrive at more definite answers, is error: *Atchison etc. R. R. Co. v. Cone*, 37 Kan. 567. A special verdict that defendant had borrowed a certain sum, and



a general verdict for a larger sum, are not conflicting when the difference is merely the interest on the amount borrowed: *Miles v. Wikel*, 74 Iowa, 712.

JURY. — THE RIGHT TO POLL THE JURY IS, AS A GENERAL RULE, undeniable, and a refusal of such right by the court is error for which a judgment would be reversed: *James v. State*, 55 Miss. 57; 30 Am. Rep. 496; *Norrell v. Deval*, 50 Me. 272; 11 Am. Rep. 413.

GILLETT v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

[73 WISCONSIN, 208.]

FIRE INSURANCE — MORTGAGEE TAKING OUT POLICY — STIPULATION AGAINST ADDITIONAL INSURANCE — ADDITIONAL INSURANCE OBTAINED BY ONE MORTGAGOR. — Mortgagee is bound by the stipulations of a policy, so that the policy will be defeated by subsequent unauthorized insurance, although obtained by and insuring the interest of one of the mortgagors only, where the mortgage provided that if the mortgagors failed to insure the property, the mortgagee might insure the same, the expense thereof being added to the mortgage debt, and the mortgagee applied for insurance on the property to secure his interest therein, and a policy was issued running to the mortgagors, but providing that the loss, if any, should be payable to the mortgagee, and containing a stipulation avoiding the policy if the insured obtained additional insurance without consent of the company, and the mortgagee paid the premium, and retained the policy, without objection, for nearly a year before the property was burned.

ACTION on a policy of fire insurance The plaintiff held a mortgage on certain real estate of M. A. York & Co., a firm consisting of Mrs. M. A. York and her husband, Solomon, to secure an indebtedness of two thousand dollars, which still remains unpaid. The mortgage contained a covenant by the mortgagors to keep the buildings on the mortgaged premises insured for at least two thousand five hundred dollars, and to assign the policies to the plaintiff as collateral security for the mortgage debt, and in default thereof, the plaintiff was authorized to effect such insurance, the costs and expenses of which to be added to and become a part of the mortgage debt. The mortgagors having failed to obtain such insurance, the plaintiff, on September 7, 1883, procured from the defendant the policy in suit, which insured M. A. York & Co. against loss or damage by fire for one year, in the sum of one thousand dollars, and contained a stipulation that the policy should be void if the insured should obtain any other insurance on the property, or any part thereof, without the consent of the company. It permitted two thousand dollars concurrent insurance,

and provided that the "loss, if any, under this policy, payable to J. D. Gillett, Esq., as his interest may appear." In March, 1884, Mrs. York, without the consent of the defendant, procured further insurance, on substantially the same property, in several other insurance companies, amounting in the aggregate to four thousand dollars. On August 16, 1884, the property was destroyed by fire. The defendant refused to pay the insurance, and the plaintiff brought this action. The jury were directed to return a verdict for the defendant, which they accordingly did. A motion for a new trial was denied, and judgment entered for the defendant pursuant to the verdict. The plaintiff appeals from this judgment. Further facts are stated in the opinion.

Silverthorn, Hurley, Ryan, and Jones, for the appellant.

Cate, Jones, and Sanborn, for the respondent.

LYON, J. To strengthen his security for the mortgage debt by an insurance upon the mortgaged property, two methods were open to the plaintiff. He might have taken a policy directly to himself, insuring his mortgage interest alone, if he could find an insurer willing to issue such a policy; or he could obtain a policy running to the mortgagors, stipulating that the loss, if any, should be paid to him as his interest should appear. Perhaps such a policy would not be an insurance of the mortgage interest, as such, but probably would cover such interest. Either mode would protect the plaintiff's security under his mortgage, but with this difference: had the policy run to himself alone, insuring only his mortgage interest, it would not be defeated by an unauthorized insurance upon the same property, obtained by the mortgagors, while a policy running to the mortgagors, insuring the property generally (as in the present case), would be defeated by such unauthorized insurance.

The plaintiff did not stipulate with the agent of the defendant company, Mr. Huntington, for a policy to himself, insuring only his mortgage interest. The only testimony on the subject was given by the plaintiff himself, and is as follows: "I applied to Mr. Huntington for the insurance on this property after the mortgage was executed. I received this policy upon the application." In answer to the question by his own counsel, "At the time when you applied to Mr. Huntington for this insurance, did you state to him what interest you had in the property?" he further testified: "I think I did tell him

that I had a mortgage on the property, and wanted to insure my interest in it." He further testified that he paid the premium for such insurance. Thus it is undisputed that the plaintiff applied for an insurance upon the mortgaged property to secure his interest therein under his mortgage, without any agreement or reservation as to its form or the stipulations it should contain. The agent issued the policy in suit upon such application, which gives the plaintiff the security he desired. The plaintiff accepted it as a compliance with his application, and held it nearly a year before the property was burned without making any objection that it did not comply with the original parol contract for the insurance. We think it too late for the plaintiff to be now heard to allege that the policy does not contain the terms of the contract of insurance which the parties made, even did the testimony tend to show (which it does not) that a parol agreement was in fact made to the effect that the policy should issue to the plaintiff, insuring his mortgage interest alone.

Much weight is given in the argument of counsel for the plaintiff to the fact that the plaintiff paid the premium for the insurance. But this fact must be considered in connection with the covenant in the mortgage that the mortgagors should insure the property, and failing to do so, that the plaintiff might insure the same, and that the expense thereof should be added to and constitute a part of the mortgage debt. So when the plaintiff says he paid the premium for the insurance, the effect of his testimony is, that he thereby increased the mortgage debt by the sum so paid. Moreover, the above covenant clearly contemplates an insurance of the mortgagors' interest in the property, which could only be effected by a policy running to them. The covenant is ample authority to the plaintiff to insure the property in their names.

Having thus determined that the plaintiff is bound by the stipulations in the policy in suit, it necessarily results that the obtaining by the mortgagors of any unauthorized insurance on the same property invalidates the policy, under the stipulation therein against additional insurance without the consent of the defendant company. Has this stipulation been violated? Mrs. York, one of the owners of the property, obtained policies in her name alone, in March, 1884, on substantially the same property, for four thousand dollars, without the consent or knowledge of the defendant company. Nothing appears adverse to the validity of such additional insur-

ance. The policy in suit permitted concurrent insurance to the amount of two thousand dollars only. Had this insurance been effected by M. A. York & Co., it would doubtless have defeated the policy. It may be conceded that these policies for four thousand dollars insure only the interest of Mrs. York in the insured property, which, presumably, is one half thereof.

It is maintained by counsel for plaintiff that, because the policies were obtained by and issued to Mrs. York alone, the four-thousand-dollar insurance is not a breach of the stipulation against other insurance. The rule invoked to support this proposition is thus laid down in 2 Wood on Insurance, section 377: "In order to amount to other insurance, the interests covered by the policies must be identical." We think such interests are identical in the present case. The policy in suit insures the interest of Mrs. York in the insured property, and the additional policies issued to her insure the same interest. We find no established rule that because Solomon York's interest in the property was insured by the policy in suit, and not by the four-thousand-dollar policies, the latter policies do not constitute double insurance. In *Continental Ins. Co. v. Hulman*, 92 Ill. 145, 34 Am. Rep. 122, it was held that an unauthorized insurance by the wife was a breach of a stipulation against other insurance in a former policy on the same property, issued to her and her husband. Such we think the law. Several distinctions between the Illinois case and the one under consideration are noted by counsel, some of which are real and some are not; but we think these do not affect the applicability of the rule there laid down to this case.

The case of *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121, is relied upon as holding a different rule. The case is this: Foster held a mortgage on certain property, executed by B. He obtained an insurance upon the property, paid the premium, and, without the knowledge or authority of B., took a policy in their joint names, the policy containing the usual stipulation as regards other insurance. B. had obtained another insurance, in violation of the stipulation. The court held that, under the circumstances, the insurance was solely for F.'s benefit, and that the policy was not invalidated by such act of B. The difference between the two cases is, the policy in the Illinois case ran to Foster, the mortgagee, and in legal effect, as the court held, to him alone; while here the

policy runs to the mortgagors alone. This difference is radical and controlling, and calls for the application in this case of a different rule of law.

Another case much relied upon by counsel for the plaintiff may properly be noticed in this connection. It is that of *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6. Norman and George N. Pitney were joint owners of the insured property, which was a quantity of wool. Norman obtained a policy in his own name. Afterwards he told the agent that he had forgotten to mention the interest of George and his intention to have that interest insured. The agent attempted to accomplish that purpose by inserting in the policy these words: "In case of loss, if any, one half payable to George N. Pitney, as his interest may appear." Under these circumstances, it was held that the interest of George N. in the wool was covered by the policy. That case does not hold that a breach of a covenant against further insurance would not have resulted had either of the owners of the wool insured his interest therein in his own name without the consent of the company. Hence the case is not in point here. That case was decided by a bare majority of the commission of appeals, Lott, C. C., and Earl, C., dissenting. We should hesitate to indorse all the doctrines there asserted without further examination.

We conclude that the policy in suit was invalidated by the unauthorized insurance obtained by Mrs. York, and hence that the court properly directed a verdict for the defendant.

The judgment of the circuit court is affirmed.

FIRE INSURANCE — MORTGAGOR AND MORTGAGEE — CONDITION AGAINST OTHER INSURANCE. — Where a husband and wife mortgaged the wife's premises, and got an insurance policy thereon payable to the mortgagee, as his interest might appear, and the policy was conditioned to be void in case of subsequent insurance, whether valid or not, without consent written on the policy, and the wife alone procured another insurance in her own name, the first insurance was avoided by the second: *Continental Ins. Co. v. Hulman*, 92 Ill. 145; 34 Am. Rep. 122.

HERMANN v. STATE.

[78 WISCONSIN, 242.]

CRIMINAL LAW — PROSTITUTION — EVIDENCE — AGE OF GIRL — MOTHER'S TESTIMONY. — Testimony of the mother is the best evidence as to the age of her child, in a criminal prosecution against a person for inducing or knowingly suffering a girl under the age of twenty-one years to resort to or be in or upon her premises for the purpose of being unlawfully and carnally known.

ID. — JURY MAY DETERMINE FROM GIRL'S PERSONAL APPEARANCE WHETHER DEFENDANT KNEW SHE WAS UNDER AGE OF TWENTY-ONE. — Court may properly allow the jury to determine from the girl's personal appearance, or from view only, whether the defendant knew that she was under the age of twenty-one at the time the girl was suffered to resort to the defendant's premises for the purpose of prostitution, where the evidence showed that the girl was under the age of sixteen, in a criminal prosecution under a statute against a person for inducing or knowingly suffering a girl under the age of twenty-one years to resort to or be in or upon her premises for the purpose of being unlawfully and carnally known.

INFORMATION against Ida Hermann. The opinion states the facts.

J. C. McKenney, for the plaintiff in error.

C. E. Eastabrook, attorney-general, and *L. K. Luce*, assistant attorney-general, for the state.

ORTON, J. The information is under section 4, chapter 214, Laws of 1887, which provides that "any person, being the owner of any premises, or having or assisting in the management or control thereof, who induces or knowingly suffers any girl under the age of twenty-one years to resort to or be in or upon the premises for the purpose of being unlawfully and carnally known by any person or persons, shall be punished by imprisonment in the state prison not exceeding three years nor less than one year." The information charges both that the defendant "did induce and knowingly suffer one Bertha Priess to resort to and be in or upon the premises," etc. The defendant was convicted and sentenced, after a motion by her counsel to discharge her for want of evidence that she knew that Bertha Priess was under the age of twenty-one years when she so suffered her to resort to or be in or upon her premises for such purpose.

Ottillie Priess, the mother of Bertha, as a witness, was asked by the district attorney, "What is the age of Bertha?" This was objected to by the defendant's counsel, and the witness

stated that she had or kept a baptismal certificate. It was contended that such family record was the best evidence of her age. We have no statute that makes such record evidence, and section 4160 of the Revised Statutes makes the registration of births in the register's office only presumptive evidence thereof. In both cases, the evidence would be merely hearsay or secondary, at best. It certainly could not supersede the testimony of the mother of the exact age of her child. No evidence could possibly be better or more reliable.

The court, by proper instructions, allowed the jury to determine the question whether the defendant knew that Bertha was under the age of twenty-one years when she so suffered her to resort to her premises for such purposes, from her personal appearance, or from view only, and this was excepted to. The mother had testified that Bertha was born on the thirteenth day of March, 1872. The information was filed February 14, 1888, and charged the offense with having been committed on the tenth day of January previously; and the trial was had about the seventeenth day of February, so that Bertha, at the time, was under the age of sixteen years. Where, as in this case, the girl is so far under the age of twenty-one years, and just above the age of childhood and puberty, a woman of experience in the observation of girls would most certainly know that she was under the age of twenty-one years. There are appearances of development and maturity, or of their absence, which such a woman, or any woman, could not mistake. Sixteen is the first stage and tender age of womanhood. I know of no good reason why the personal appearance of this young girl, on view in presence of the jury, was not very satisfactory evidence that the defendant knew that she was under the age of twenty-one years. In cases where the girl is much nearer the age of twenty-one, such evidence would be more unreliable as a matter of course. Each case must be tried upon its own facts. Our statute, even in criminal cases, sanctions evidence obtained by view. If the subject of the *scienter* in this case had been that Bertha was a girl, as well as under the age of twenty-one years, and the question had been whether the defendant knew her to be a girl, her appearance alone would be satisfactory, without question. The evidence in this case, in a degree, is very much of the same character. The learned attorney-general has furnished the court with authorities which sanction this kind of evidence. The cases of *State v. Arnold*, 13 Ired. 184, and

State v. McNair, 93 N. C. 628, are much in point. The following cases are authority by analogy: *Garvin v. State*, 52 Miss. 207; *Warlick v. White*, 76 N. C. 175; *People v. Gonzales*, 35 N. Y. 49; *People v. Muller*, 32 Hun, 209; *King v. New York Cent. & Hudson River R. R. Co.*, 72 N. Y. 607; *Gaunt v. State*, 38 Alb. L. J. 103; 50 N. J. L. 490; *Clark v. Bradstreet*, 38 Alb. L. J. 287; 80 Me. 454.

The record makes the court say, in instructing the jury, that "this girl is so near the age of twenty-one years, and her size is such, it would seem to make out a case similar to the one I have suggested. This must be a mistake in the record, or else it was a slip of the tongue or of the pen, or something is left out explanatory of it. But as it is, it is favorable to the defendant, and she cannot complain.

The judgment of the municipal court is affirmed.

CRIMINAL EVIDENCE. — IN NO CASE SHOULD EVIDENCE BE EXCLUDED OF ANY FACT OR CIRCUMSTANCE CONNECTED with the principal transaction, from which an inference as to the truth of a disputed fact can reasonably be made, especially when it is necessary to show a particular intent in a party as an essential ingredient of the crime with which he is charged: *Commonwealth v. Jeffries*, 7 Allen, 548; 82 Am. Dec. 712.

HANSEN v. FLINT AND PERE MARQUETTE R. R. Co.

[73 WISCONSIN, 242.]

COMMON CARRIER — SHIPPING-RECEIPT — THROUGH-CONTRACT — CUSTOM. —

Through-contract is created by a shipping-receipt in the following form, and parol evidence is inadmissible to show a custom limiting its effect as such: "Milwaukee, —, 188—. — Shipped by Roundy, Peckham, & Co. the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary delay. — Consigned to Hansen & Kirsh, Onkama, Mich."; on the face of which the carrier's agent stamped and wrote: "F. & P. M. R. R. Co. — Rec'd. Nov. 2, 1887. — By agent, P., Milwaukee."

Id. — **AGENCY — PROOF OF AUTHORITY OF AGENT TO MAKE THROUGH-CONTRACT.** — Express authority of the agent of a common carrier to give a receipt for goods, creating a through-contract, need not be proved, when he acted as such in the proper place for receiving goods for the carrier, and was in possession of the carrier's stamp to be used on such receipts, and the carrier took possession of the goods and caused them to be shipped, presumably with knowledge of the receipt.

ACTION by Hansen and Kirsh against the Flint and Pere Marquette Railroad Company to recover the value of certain goods which had been shipped over the defendant's line, and

which were destroyed by fire. There was a verdict and judgment for the plaintiffs, and the defendant appealed. The facts are stated in the opinion.

Frank M. Hoyt, for the appellant.

Winkler, Flanders, Smith, Bottum, and Vilas, for the respondents.

ORTON, J. The facts are substantially as follows: Roundy, Peckham, & Co., merchants of the city of Milwaukee, on November 2, 1887, upon an order from Hansen and Kirsh, the respondents, of Onokama, Michigan, shipped to them by the appellant company a large bill of goods. Roundy, Peckham, & Co., on that day, sent the goods to the warehouse of the appellant by their drayman, and received in return the following receipt: "Original. — Milwaukee, —, 188—. — Shipped by Roundy, Peckham, & Co. the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary delay. — Consigned to Hansen & Kirsh, Onokama, Mich. — Description of articles. — Weight." Here follows a list of the articles shipped, covering four sheets of paper, upon each of which is the same heading as above, and on the face of the receipt, and on each page or sheet, is stamped by the agent of the appellant company the following: "F. & P. M. R. R. Co. — Rec'd. Nov. 2, 1887. — By Agent — Milwaukee." On the face of the stamp is written the letter "P." The stamp was affixed to the receipt by a Mr. Pawlett, the agent of the appellant company, on that day, who wrote the letter "P." thereon as his initial letter, and the stamp used by him was the one customarily used by the agent for such purpose. A portion only of the goods arrived at Onokama, their destination, the remainder having been burned or damaged at Manistee, Michigan, by fire. The value of the goods so lost was \$651.74, for which, and interest of \$45.62, making a total of \$697.36, the jury rendered a verdict for the plaintiffs by direction of the court, and from the judgment thereon this appeal is taken.

The contention of the learned counsel of the appellant is, that the defendant was entitled to show that its route and line as a carrier extended no farther than Manistee, Michigan, and that said goods were safely carried to that point, and deposited in a warehouse, and in a place set apart for the use of the captain and proprietor of a boat called Adriene, which plied between Manistee and Onokama, who receipted for the goods,

and was in the act of removing them, and had removed a part onto his boat, when the warehouse was totally destroyed by fire, and the goods not then removed were destroyed or injured without negligence of the defendant; and that the defendant was entitled to show further that Roundy, Peckham, & Co. well understood that the custom was between the defendant's line and such connecting carrier that such connecting carrier had nothing to do with the defendant's line, and the circumstances connected with the giving of the receipt, and that the agent, Pawlett, had no authority to make a through bill of lading between Milwaukee and Onekama. This evidence was ruled out by the court, and proper exceptions taken. The admissibility of this evidence depends upon the legal character of the receipt as being a full and perfect contract to carry the goods through the entire route, or otherwise. If the receipt constitutes a through bill of lading of the goods from Milwaukee to Onekama, then it could not be contended that any parol evidence could be given to explain or vary it, and what is established by contract cannot be changed or affected by custom. The general usage of a railroad company in respect to forwarding goods marked for points beyond its terminus will be deemed to enter into its contract of transportation: *Hooper v. Chicago & N. W. R'y Co.*, 27 Wis. 81; 9 Am. Rep. 439; *Wood v. Milwaukee & St. Paul R'y Co.*, 27 Wis. 541; 9 Am. Rep. 465. Nor could it be contended that the express authority of the agent must be proved when he acted as such in the proper place for receiving goods for the company, and was in possession of the company's stamp to be used on such receipts, and the company took possession of the goods and caused them to be shipped with knowledge of the receipt, which it must be presumed the company had before they were so shipped. No other proof of agency is necessary than that the agent's acts justify the party dealing with him in believing that he had authority: *Kasson v. Noltner*, 43 Wis. 646.

The sole question, therefore, is, Does the receipt import a full and complete contract to carry the goods to their destination, or such a contract that it was fully performed by a delivery of the goods to the connecting carrier? I cannot well see how a receipt or bill of lading could be drawn to make a through-contract if this receipt does not. It has all the usual terms. The destination, and the consignees at that place are named. The goods are "shipped" by Roundy,

Peckham, & Co., "in good order, to be delivered in like good order, as addressed, without unnecessary delay." The address is "Hansen & Kirsh, Onkama, Mich.," as the consignees. Outside of the stamp upon it, it is more like a shipping bill or bill of lading than a mere receipt. The goods are not received, but shipped, by Roundy, Peckham, & Co. The stamp is marked "Rec'd. Nov. 2, 1887, by agent, P., Milwaukee." All the apt words to make a perfect, thorough-contract are used, and none omitted. Manistee, as the destination, is not mentioned, nor is it found in the contract anywhere, for any purpose, nor is it known from the receipt or contract, that there was any connecting carrier on the route, or if so, what one, by water, from Manistee. The respondents took no responsibility of carriage beyond Manistee, but the company assumed it and contracted for it. Even within the rule contended for by the learned counsel of the appellant,—which is claimed to be the general rule by the authorities,—"that where a carrier receives goods for transportation beyond his own line he is not responsible for any loss occurring beyond his line, unless there is a special contract or some usage of business which shows that such carrier takes the goods for the whole route," the defendant was bound to carry the goods the whole route; for there was a special contract to that effect, as we have seen. In *Wahl v. Holt*, 26 Wis. 703, the bill of lading, or "shipping-receipt" as it is called in the opinion, had the same apt words: "To be delivered in good order and condition as when received, as addressed on the margin, or to his or their consignees." On the margin was: "Account C. Wahl, George F. Wilson, Providence, R. I." But the receipt in that case had also, "Care A. T. Co., Buffalo," and, "By the Commercial Line of Propellers from Milwaukee to Buffalo." These words were held to mean only that the line of propellers by which the goods were shipped ran "from Milwaukee to Buffalo," and "were not intended to define the points between which the commercial line had undertaken to transport the goods"; and it was held that the proprietor of the Commercial Line contracted to carry the goods to Providence, Rhode Island. In that case, as in this, there was mixed land and water transportation by connecting lines. The shipping-receipt or bill of lading in the present case is more explicit, definite, and complete, as a through-contract, than that in the above case, and there is no mention of an intermediate point at the termination of the defendant's line to

break the continuity between Milwaukee and Onekama. It is very clear that that case rules this, and is sufficient authority for holding that this is a through-contract, without citing other authorities. That case as well as this is readily distinguishable from *Parmeles v. Western Transp. Co.*, 26 Wis. 439, as well as from all other cases in which the end of the route was held to be an intermediate point, or the end of the defendant's line. We think that the court was warranted in directing a verdict for the plaintiffs.

The judgment of the circuit court is affirmed.

CARRIERS. — BILLS OF LADING, CONCLUSIVENESS OF, AS EVIDENCE OF THE CONTRACT TO CARRY: *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117, and note; also reported in 1 Am. Rep. 131; *Graves v. Lake Shore etc. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282; *McMillan v. Michigan etc. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208. A bill of lading stipulating for a reduced rate or a special rate is not conclusive, but only *prima facie* evidence, open for explanation or even contradiction: *McFadden v. Missouri P. Ry Co.*, 92 Mo. 343; 1 Am. St. Rep. 721.

CARRIERS — CONTRACTS OF AGENTS OF. — A carrier is bound by its freight agent's contracts for the transportation of goods: *Strohn v. Detroit etc. R. R. Co.*, 23 Wis. 126; 99 Am. Dec. 114. For a general discussion of the liabilities of the agents employed by carriers, see note to *Hooper v. Wells, Fargo, & Co.*, 85 Am. Dec. 230; *McClure v. Richardson*, Rice, 215; 33 Am. Dec. 105; *Farmers' etc. Bank v. Champlain T. Co.*, 16 Vt. 52; 56 Am. Dec. 68.

BARRETT v. STRADL.

[73 WISCONSIN, 385.]

EJECTMENT — VALUE OF IMPROVEMENTS MADE BY DEFENDANT — TITLE UNDER HOLDER OF LIFE ESTATE — ADVERSE POSSESSION AGAINST REMAINDERMAN. — Possession of one who enters under a deed from the holder of a life estate, purporting to convey the fee, and the grantor intending to convey the fee, and the grantee supposing he is getting the fee, becomes adverse to the remainderman immediately upon the death of the tenant for life, so as to entitle him from that time up to the time of the commencement of the action to the benefits of section 3096 of the Revised Statutes of Wisconsin, which provides that in case of a recovery of land on which the party in possession, or those under whom he claims, "while holding adversely by color of title asserted in good faith," shall have made permanent and valuable improvements, or shall have paid taxes assessed, such party shall be entitled to have from the plaintiff the value of such improvements at the time of the verdict or decision against him, and the amount paid for taxes, with interest from the date of payment.

FINDINGS AS TO CHARACTER OF DEFENDANT'S POSSESSION. — Findings that during a certain time the defendant in an action of ejectment had exclusive possession of the premises, that he claimed to be the sole owner

thereof under and by virtue of a deed to him, and that he asserted his title founded on such deed in good faith, are equivalent to an express finding that he was in possession during such time holding adversely under color of title asserted in good faith, so as to entitle him, under section 3096 of the Revised Statutes of Wisconsin, to the value of the improvements which he has made on a recovery against him.

PRESUMPTION AS TO CONTINUANCE OF ADVERSE POSSESSION. — Possession of defendant in ejectment will be presumed to have continued to be adverse, in the absence of evidence showing a change in its character, so as to entitle him, under section 3096 of the Revised Statutes of Wisconsin, to the value of the improvements which he has made, on a recovery against him, where the evidence shows that the defendant was at one time in possession of the land in question, holding adversely to the plaintiff under color of title asserted in good faith, and that such possession continued down to the commencement of the action.

IMPROVEMENTS MADE BY DEFENDANT AFTER NOTICE OF PLAINTIFF'S CLAIM. — Defendant in ejectment is entitled to the value of improvements made by him, even after notice of the plaintiff's claim, under section 3096 of the Revised Statutes of Wisconsin, on a recovery against him, where he entered into possession of the premises under color of title asserted in good faith. In order to change the nature of his adverse possession, there must not only be a knowledge that there is a better title, but there must be an express or implied yielding to such superior title.

EJECTMENT by Barrett against Stradl, brought December 20, 1886, to recover an undivided three fifths of a certain tract of land. The defendant pleaded the statute of limitations, and also set up a claim for improvements made and taxes paid by him during his adverse possession. The material facts as to the title of the land appear in the opinion. There was a special verdict, finding: 1. That the plaintiff was, at the commencement of the action, the owner in fee of an undivided two fifths of the land described in the complaint; 2. That the plaintiff was entitled to the possession of such undivided two fifths; 3. That at the commencement of the action the defendant unlawfully withheld the possession of said undivided two fifths from the plaintiff; 4. That the value of the use of the premises described in the complaint, with all the improvements thereon, from February 5, 1885, to the present time, was eighty dollars per year; 5. That the value of the use of said premises, as they were on February 5, 1885, was thirty dollars per year; 6. That the value of the use of the premises, excluding the value of any permanent and valuable improvements made by the defendant and his grantor, Wenzel Kadlic, was twenty dollars per year; 7. That the premises were worth at the present time twelve hundred dollars more than they would have been without the improvements made thereon by the defendant between February 5, 1885, and December 20, 1886;

8. That the taxes paid on the land in 1886 and 1887 were \$56.71; 9. The question, Did the defendant in fact enter and take possession of the premises described in the complaint, under his deed from Kadlic, claiming to be the sole and exclusive owner in fee, and asserting his ownership under the deed in good faith? was answered by the court in the affirmative; 10. The question, When did the defendant first have actual knowledge that the premises in question belonged to the heirs of Catherine Barrett? was answered, When the circuit decided to that effect in this action; 11. The question, When did the defendant first have good reason to believe that the premises in question belonged to the heirs of Catherine Barrett? was answered, At the county court in November, 1886; 12. The question, Was the defendant in the sole and exclusive possession of the premises from February 5, 1885, to the commencement of this action on December 20, 1886? was answered by consent in the affirmative; 13. The question, Did the defendant during such time claim to be the sole and exclusive owner in fee of the premises under and by virtue of his deed from Kadlic? was answered in the affirmative; 14. The question, Did the defendant during such time assert his title under the deed from Kadlic to him in good faith? was also answered in the affirmative; 15. The question, Did the defendant subsequently to February 5, 1885, ever notify the plaintiff that he disputed or denied the plaintiff's title? was answered by the court in the negative. The plaintiff requested the court to submit to the jury the question, whether during the period from February 5, 1885, to December 20, 1886, the defendant knew, while making the improvements made by him during that time, that his title to the premises was contested by the plaintiff claiming a superior title to them, which request was refused, and the plaintiff excepted. The defendant moved for judgment on the special verdict, that, together with the judgment in plaintiff's favor for the recovery of an undivided two fifths of the premises described in the complaint, and two fifths of the rents and profits of the premises since February 5, 1885, as found by the jury, with plaintiff's costs for the trial of that issue, the defendant do recover from the plaintiff a two-fifths share of the taxes specified in the verdict, and two fifths of the twelve hundred dollars found by the jury as the value of the defendant's improvements, besides all costs incurred by the defendant upon the trial of the issue as to taxes and improvements; that plain-

tiff's recovery for rents and profits and costs be set off against defendant's recovery for taxes, improvements, and costs; that defendant be adjudged to have a lien upon plaintiff's interest in the premises to secure the payment of the balance that may be coming to him for such taxes, improvements, and costs over and above such offset; and that plaintiff pay to defendant the amount of such balance, with interest, within three years, as a condition of execution for the possession of the premises recovered. The court entered judgment accordingly. The plaintiff moved for judgment on the special verdict, rejecting the answers to the seventh and eighth questions, and also made a motion to set aside the verdict and grant a new trial, or to set aside so much of the verdict as related to the question of defendant's improvements. It was stipulated that the defendant's claim for taxes and improvements should be tried at the same time and by the same jury as the right of the parties to the land in question.

Ellis, Greene, and Merrill, for the appellant.

Nash and Nash, for the respondent.

TAYLOR, J. The material facts as to the title of the lands in question are as follows: Patrick Barrett, the father of plaintiff, became possessed of and the owner in fee of the lands described in the complaint of 1856. In 1874 he conveyed by warranty deed to his son-in-law John Nash, and three days after the conveyance to Nash he (Nash) conveyed the same land to Catherine Barrett, the wife of said Patrick Barrett, and plaintiff's mother. The mother died intestate, in June, 1875, while living on the premises, and without having conveyed the same. Patrick Barrett, the father and husband, also lived on the land with his wife, Catherine Barrett, at the time of her death, and continued to occupy said land after the death of his wife until February 7, 1877, when he conveyed by warranty deed to one Wenzel Kadlic, for the consideration of two thousand one hundred dollars, taking a mortgage in part payment for the sum of sixteen hundred dollars. Kadlic occupied the premises until the year 1880, and on April 19, 1880, he conveyed the land to the defendant by warranty deed for the sum of \$1,650, and as a part of this consideration the defendant assumed the payment of the \$1,600 mortgage given by Kadlic to Barrett. Upon receiving this deed, the defendant went into the immediate possession of the land, claiming to own the same; and he remained in possession up

to the present time, making permanent improvements on the land, and has made payments on the sixteen-hundred-dollar mortgage so as to reduce the amount of the same to twelve hundred dollars or less when this action was commenced. Patrick Barrett died on February 5, 1885.

These facts show that Patrick Barrett, at the time he sold the premises to Kadlic, had only a life estate in the same as a tenant by the curtesy of his wife, Catherine Barrett. There is no contention on the part of the defendant and respondent but that the plaintiff was the owner of the undivided two fifths of the premises at the time this action was commenced, nor that the defendant withheld the possession from him, as alleged in his complaint. The real controversy between the parties is, whether the possession of the defendant was of such a character as to entitle him to recover for permanent improvements made by him on the lands, under section 3096 of the Revised Statutes of 1878. The part of the section applicable to the controversy in this case reads as follows: "In every case where a recovery shall be had of any land on which the party in possession, or those under whom he claims, while holding adversely by color of title asserted in good faith, founded on descent or any written instrument, shall have made permanent and valuable improvements, or shall have paid taxes assessed, such party, for himself, and for the benefit of those under whom he claims, shall be entitled to have from the plaintiff, his heirs or assigns, if he insist upon his recovery, the value of such improvements at the time the verdict or decision against him is given, and the amount paid for taxes, with interest from the date of the payment, to be assessed and recovered as hereinafter provided, and for the payment thereof shall have a lien on the real estate so recovered." Under this section, the court below held that the defendant could only recover, in any event, for improvements made by the defendant on said lands, and for the taxes paid thereon, between the date of the death of Patrick Barrett and the date of the commencement of this action.

The principal contention of the learned counsel for the appellant is, that the defendant cannot set up that he was in possession, holding adversely by color of title asserted in good faith, because he entered and held by a conveyance from the grantee of Patrick Barrett, who had only a life estate in the premises, made during the lifetime of said Barrett. The claim of the learned counsel is, that one who enters upon the posses-

sion of real estate by deed from a person holding only a life estate in the premises cannot, so far at least as those entitled to the reversion are concerned, be in possession under claim of title, holding adversely to them, within the meaning of the statute. The learned circuit judge held, with the counsel for the plaintiff, so far as to hold that the possession of the defendant could not be adverse as against those owning the reversion during the lifetime of the person owning the life estate, either for the purpose of establishing a title to the land by adverse possession, or for establishing a claim for improvements made on the land during the life of such person; and on the trial limited the defendant in his claim for improvements and taxes to such as were made and paid after the death of Barrett, the owner of the life estate, and before the commencement of plaintiff's action.

The contention of the learned counsel for the appellant, that a person entering into the possession of land under a conveyance from a person having only a life estate therein cannot hold adversely to the person entitled to the remainder, during the lifetime of the person owning the life estate, so as to set the statute of limitations running against the remainderman, is well settled by the authorities in other states, and is fully recognized by this court: See *Wiesner v. Zaun*, 89 Wis. 189. The reason of this rule is based upon the fact that the remainderman cannot, during the life of the person holding the life estate, bring an action against the person in possession under such life tenant, to recover possession of the premises; and it would be absurd, therefore, to bar the right of the remainderman by a possession which he has no right to object to, and to prevent which he has no remedy by action.

We think it is equally well settled that when a person enters under a deed from the person who holds the life estate, which on its face conveys an estate in fee, and when the grantor intends to convey the fee, and the grantee supposes he is getting a conveyance of the fee, the person entering under such deed holds in fact adversely to all the world, but he cannot avail himself of the rights of an adverse possession under the statute as against the remainderman during the life of the owner of the life estate, but immediately upon the death of the person holding the life estate such possession, if continued, becomes adverse to the remainderman. In the language of the court in *Sands v. Hughes*, 53 N. Y. 294: "There is no rule

which prevents a hostile title being acquired, or an adverse possession being originated, during the running of an assessment lease (granting a limited estate), which possession would ripen into a title in twenty years after the end of the lease": See also *Christie v. Gage*, 71 N. Y. 193; *Millard v. McMullin*, 68 Id. 345; *Fleming v. Burnham*, 100 Id. 1, 8, 12; *Jackson v. Schoonmaker*, 4 Johns. 402; *Clarke v. Hughes*, 13 Barb. 147; *Miller v. Ewing*, 6 Cush. 34; *Jackson v. Harsen*, 7 Cow. 323, 327; 17 Am. Dec. 517; *Gernst v. Lynn*, 31 Pa. St. 94; 1 Am. & Eng. Ency. of Law, 237, and cases cited in note 1, and 288, note 2. The rule established in the cases above cited was adopted by this court in the case of *Wiener v. Zaun*, 39 Wis. 188, 203, 204. The reason of the latter rule is, that immediately on the death of the life tenant the remainderman may maintain an action to recover the possession from the person in possession claiming adversely.

The rule invoked by the counsel for the appellant, that a person entering under a tenant in possession, even though he take a deed in fee, cannot hold adversely to the landlord, does not apply to the case of a person entering under a deed from a person in possession owning a life estate. This rule only applies to the case where the person in possession holds the conventional relation of tenant to the owner of the fee, and not to the case of a person holding a life or other limited estate derived from some other source than from the owner of the reversion. On this point see *Saunders v. Hanes*, 44 N. Y. 365; *Christie v. Gage*, 71 Id. 193; *Jackson v. Harsen*, 7 Cow. 323, 326; 17 Am. Dec. 517.

The above authorities clearly negative the claim made by the learned counsel for the appellant that the defendant produced no evidence on the trial which tended to show that he was in possession of the premises, holding them adversely to the claim of the plaintiff, at the time he made the improvements for which he claimed pay.

It is further urged by the learned counsel for the appellant that the special verdict is imperfect in not expressly finding that the defendant was in possession holding adversely to the plaintiff at the time the improvements were made. On the part of the respondent, it is claimed that there was no request that such a finding should be included in the special verdict. It is also insisted that the findings numbered 12, 13, and 14 are equivalent to an express finding of the fact that the defendant was in possession holding adversely to the claim of


the plaintiff when the improvements for which he was allowed were made. These findings, if sustained by the evidence, show that during the time in question the defendant had exclusive possession of the premises, that he claimed to be the sole owner thereof under and by virtue of the deed to him from Kadlic, and that he asserted his title founded on said deed in good faith. We are clearly of the opinion that these findings are equivalent to an express finding that he was in possession, holding adversely under color of title asserted in good faith, when the improvements were made.

The only other question bearing upon this point is, whether these findings are supported by the evidence. It seems to us that the evidence is clear and undisputed that the defendant, when he bought the land from Kadlic, believed he was getting a good title in fee to the premises. He paid a full consideration for a perfect title in fee; and he testifies that he paid a man to examine the title for him previous to his purchase, and that such person reported to him that the title was perfect, and the deed given and taken was a deed purporting to convey the estate in fee. After his purchase, and down to the death of the tenant for life, his assertion of title was constant, as evidenced by his possession and his continuing to pay upon the mortgage he had assumed to pay as a part of the purchase price. There certainly is no evidence which tends to show that he abandoned his claim of title under his deed from Kadlic, and all the evidence shows that his possession continued under claim and color of title under said deed after the death of Barrett, the owner of the life estate. Such possession was, therefore, adverse to the claim of the plaintiff after the death of Barrett, by all the authorities.

It is further insisted by counsel for appellant that the evidence shows conclusively that, not long after the death of Barrett, the defendant became possessed of such facts regarding the defect of his own title and the validity of the title of plaintiff that he could not thereafter hold adversely to the claim of the plaintiff, and consequently the improvements made were not recoverable under the statute. If the evidence in the case shows, as it clearly does, that there was a time when the defendant was in possession of the land in question, holding adversely to the plaintiff under color of title asserted in good faith, and such possession continued down to the commencement of the action, it will be presumed to have continued an adverse holding, unless some evidence is pro-

duced which shows that the character of the possession was changed to one recognizing the title of the plaintiff. Whether there was such a change in the relation of the defendant to plaintiff previous to his making the improvements for which he recovered compensation, was a question of fact for the jury. After reading the evidence, we are not prepared to say that the claim of the plaintiff is clearly established. The record would seem to indicate that the case was tried on the part of the plaintiff upon the theory that if the defendant had at any time notice that the plaintiff claimed to own the land in controversy, no improvements made on the land after such notice by the defendant could be made a charge against the plaintiff. This is clearly indicated by the request made by the plaintiff to submit to the jury the following question: "During the period from February 5, 1885, until December 20, 1886, did the defendant know, while making the improvements made by him during that time, that his title to the premises in question was contested or disputed by plaintiff claiming a superior title to them?" This question was not submitted, and under the decisions of this court, it was an immaterial question: See *Zwistusch v. Watkins*, 61 Wis. 615, 620. To defeat a claim for improvements under the statute, when the evidence shows that the defendant entered under color of title asserted in good faith, and has held adversely to the plaintiff, the evidence must show that the adverse possession is no longer asserted in good faith; that is, that the adverse possession has been interrupted in some way, either by abandonment or otherwise, so that the continued possession is no longer adverse to the real owner. That notice of claim of superior title by the plaintiff, or the commencement of an action to recover the premises, does not in itself interrupt the adverse possession of the defendant, or change his attitude in regard to his adverse claim, is fully sustained by the decisions of courts outside of this state, as well as by the decisions of this court in the case of *Zwistusch v. Watkins*, 61 Wis. 615; *Workman v. Guthrie*, 29 Pa. St. 495, 513; 72 Am. Dec. 654; *Moore v. Greene*, 19 How. 71; *Langford v. Poppe*, 56 Cal. 73, 76; *Jackson v. Haviland*, 13 Johns. 229, 234; *Kennedy's Heirs v. Reynolds*, 27 Ala. 364; *Ferguson v. Bartholomew*, 67 Mo. 212. Upon this point of notice of an adverse claim as affecting the good faith of the party claiming to hold adversely, see also *Warren v. Putnam*, 68 Wis. 481, 488; *Fleming v. Sherry*, 72 Id. 503, 507, 508.

It is the entry upon the possession under the color of title asserted in good faith which creates the possession which entitles the possessor to recover for his improvements; and it is unnecessary that the person making the entry should believe that his title was superior to every other title to the property at the time of making his entry in order to make his possession adverse; nor does a subsequently acquired knowledge that there is a better title in some other person necessarily change the nature of his possession from an adverse possession to a possession subordinate to the true title. In order to change the nature of the possession, there must not only be a knowledge that there is a better title, but there must be an express or implied yielding to such superior title: 1 Am. & Eng. Ency. of Law, 277, 279, 292; *Dothard v. Denson*, 72 Ala. 541, 545; *McCagg v. Heacock*, 42 Ill. 157; *Rawson v. Fox*, 65 Id. 200; *Russell v. Mandell*, 73 Id. 136, 137; *Smith v. Ferguson*, 91 Id. 304, 311; *Stubblefield v. Borders*, 92 Id. 279; *Ewing v. Burnet*, 11 Pet. 41; *Wright v. Mattison*, 18 How. 50, 57; *Pillow v. Roberts*, 13 Id. 472. The cases cited by the learned counsel for the appellant which hold that the defendant cannot recover for improvements made after he has knowledge of an adverse claim were cases arising under statutes differing from ours. This is especially so with cases in Illinois: See 1 Starr & Curtis's Ann. Stats. Ill. 994. The Illinois statute expressly provides that the defendant shall not recover for improvements made after notice of the claim of the real owner, and it also defines what shall constitute such notice. It must be admitted that what would constitute an adverse possession, so as to set the statute running in favor of the possessor against the real owner, under section 4211 of the Revised Statutes might not be sufficient to constitute such an adverse possession as would entitle the possessor to recover for improvements under section 3096 of the Revised Statutes. Under section 4211, an entry under color of title, claiming title exclusive of any other right, is all that is required. Under section 3096, the possessor must hold by color of title asserted in good faith. It seems to us very clear, from all the evidence in the case, that the defendant took possession of said lands by color of title, and that he asserted that title in good faith, and that such claim and assertion of title was not abandoned by the defendant before this action was commenced, and if we are to believe he verified his answer believing it to be true, he asserted such title after the commencement of this action.



It is urged by the counsel for the appellant that the evidence clearly shows that the defendant had, before making the improvements on the land for which he has recovered, abandoned his adverse holding, and recognized the ownership and title of the plaintiff. The jury have found against this claim, and upon the whole evidence we cannot say the finding of the jury on this point is wholly unsupported by the evidence.

It is also urged that the jury assessed the improvements at a sum greatly in excess of their real value to the farm. We can only say that the verdict is sustained by the evidence introduced by the defendant, and the circuit judge having refused to set aside the verdict on that ground, we do not feel authorized to reverse the judgment for that cause.

The judgment of the circuit court is affirmed.

EJECTMENT — BETTERMENTS. — IN AN ACTION FOR *MEANS PROCEEDS* AGAINST A *bona fide* possessor, under claim of right, he should be allowed for improvements made by him to the extent that they have increased the value of the premises, and will not be restricted to the value of the improvements themselves: *Thomas v. Malcom*, 39 Ga. 328; 99 Am. Dec. 459; *Davis v. Smith*, 5 Ga. 274; 48 Am. Dec. 279; *Pratt v. Thornton*, 28 Mo. 355; 48 Am. Dec. 492; *Byers v. Fowler*, 12 Ark. 218; 54 Am. Dec. 271; *Herring v. Pollard*, 4 Humph. 362; 40 Am. Dec. 653; *Barlow v. Bell*, 1 A. K. Marsh. 246; 10 Am. Dec. 731; *Patrick v. Marshall*, 2 Bibb, 41; 4 Am. Dec. 670; *Esling v. Handley*, 4 Litt. 346; 14 Am. Dec. 140; *Whitledge v. Wait*, Sneed, 335; 2 Am. Dec. 721; *Boatner v. Ventress*, 8 Mart., N. S., 644; 20 Am. Dec. 266; and note to *Jackson v. Loomis*, 15 Am. Dec. 349-354. To constitute one a possessor in good faith, he must not only believe that he is the true owner, and have reasonable grounds for so believing, but he must be ignorant that his title is contested by one having or claiming a better right, unless he has strong grounds to think that the adverse claim is destitute of legal foundation; and if by investigating the records of his county, he could ascertain that his title was worthless, and he improves the realty, he cannot on eviction by the true and legal owner be regarded in the light of a *bona fide* possessor, nor can he recover compensation for his improvements: *Parish v. Jackson*, 69 Tex. 614. Under the Minnesota statutes, a *bona fide* occupant, under color of title in fee, is entitled to an election to be paid the value of his improvements as a condition of the recovery of the possession by a successful claimant, unless the latter make it appear that he had no notice, actual or constructive, of the possession of the former in time to disclose or assert his claim before the improvements in question were made: *Jewell v. Truitt*, 38 Minn. 433. To entitle one evicted from the possession of realty to recover compensation for permanent improvements put upon the land by him while he was in possession, he must show either that he was a *bona fide* purchaser and a *bona fide* possessor at the time when the improvements were made, or that they were made under such circumstances that it would be a fraud on his rights not to compensate him therefor; and such fraud may consist in a failure of the real owner to notify the possessor making such improvements to desist, when he knew the claimant was making the improvements under a mistaken belief that his title was

good: *Hall v. Hall*, 30 W. Va. 779. M. having made permanent improvements on certain realty, which greatly enhanced the value thereof, was entitled to abate from the amount of rents with which he was chargeable the value of such improvements: *Moore v. Ligon*, 30 Id. 147. An occupying claimant of realty when made a defendant in an action to quiet title cannot in that action set up a claim for permanent improvements made on the land by him while in possession thereof, but must wait until the question of title is determined against him: *Buck v. Holt*, 74 Iowa, 295. But in North Carolina, if a party in an action to recover realty sets up in his pleadings a demand for compensation for permanent improvements, he should have that question passed on at the same trial of the other issues, and he will not be permitted to raise it thereafter, as the judgment rendered will be deemed conclusive of all matters put in issue by the pleadings: *Casey v. Cooper*, 99 N. C. 395.

ADVERSE POSSESSION CANNOT BE SET UP BY A TENANT FOR LIFE AGAINST THE remainderman or reversioner: *Jackson v. Harsen*, 7 Cow. 323; 17 Am. Dec. 517; *Varick v. Jackson*, 2 Wend. 166; 19 Am. Dec. 571. But after the termination of the life estate, if the reversioner permits the representatives of the tenant for life to hold, claiming as their own, for the time required by the statute, the right of recovery is gone: *Jackson v. Harsen*, 7 Cow. 323; 17 Am. Dec. 517.

STEPHENSON v. DUNCAN.

[73 WISCONSIN, 404.]

MASTER AND SERVANT — APPARENT DANGER — ASSUMPTION OF RISK. —

Servant assumes risk from an uncovered saw projecting over its frame partly across a narrow passage-way, along which he was obliged to go in the performance of his duties, by accepting and remaining in the service, the danger being apparent.

PROMISE BY MASTER TO REMOVE DANGER — CONTINUANCE IN SERVICE

AFTER PROMISE. — Servant, having the right to abandon the service because it is dangerous, does not engage to assume the risk, if he continues in the employment for a reasonable time, in consequence of assurances by the master that the danger should be removed; but if he continues his employment beyond the time within which he might reasonably expect the master would keep his promise, he will be deemed to have waived his objections, and assumed the risk.

ACTION by James E. Stephenson against John Duncan to recover damages for personal injuries alleged to have resulted from the defendant's negligence in not providing a covering for a saw in the defendant's shingle-mill, in which the plaintiff was employed, and in not providing a safe and proper passage-way by the same. The allegations of the complaint sufficiently appear from the opinion. A demurrer to the complaint for not stating facts sufficient to constitute a cause of action was overruled, and the defendant appealed from the order.

Cate, Jones, and Sanborn, for the appellant.

Schweppe and Foster, for the respondent.

COLE, C. J. When the plaintiff entered upon his employment of operating the machinery and shingle-mill owned by the defendant, the unsafe condition of such shingle-mill, the fact that the saw was not covered, and that it projected over its frame partly across the narrow passage-way along which he was obliged to go in tightening and loosening the belt, were all matters presumably within his knowledge. The condition of the passage-way and the relation of the saw to it, if unsafe and dangerous, would be seen and comprehended by a person of common intelligence; and the plaintiff assumed the risk incident to the service when he undertook the employment. Under such circumstances, the plaintiff could not maintain the action for the injury he sustained because the defendant failed to provide safe machinery, and did not cover the saw with a substantial covering, nor provide a safe passage-way in place of the defective one; for, as we have said, he must be held to have assumed the risk by accepting and remaining in the service with knowledge of the existing defects in the machinery. The rule of law upon this subject has been laid down by this court in the following language: "It is well settled that the master may conduct his business in his own way, although another method might be less hazardous; and the servant takes the risk of the more hazardous method as well, if he knows the danger attending the business in the manner in which it is conducted. Hence, if a servant, knowing the hazards of his employment as the business is conducted, is injured while employed in such business, he cannot maintain an action against the master for such injury merely because he may be able to show that there was a safer mode in which the business might have been conducted, and that had it been conducted in that mode, he would not have been injured": *Naylor v. Chicago etc. R'y Co.*, 53 Wis. 661; *Hobbs v. Stauer*, 62 Id. 108. These decisions are all we deem it necessary to cite in reply to the argument that, as between master and servant, it is the duty of the former to provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to the employment will permit. This is undoubtedly the general rule, but it cannot apply here, for the reason that the plaintiff must be deemed to have entered upon the employment with full knowledge of the existing de-

fects; therefore he assumed the risk. The fact that the saw was not covered, that the passage-way was narrow and dangerous, would be seen at a glance.

But probably the liability of the defendant was not intended to be rested upon the ground that the machinery used was not originally in a safe condition; for it is further alleged in the complaint that about ten days prior to the accident, the plaintiff informed the defendant of the defective and dangerous condition of the shingle-mill, saw, and passage-way, and requested the defendant to repair the same, and to provide a suitable and safe passage-way, and to cover the saw, notifying the defendant, at the same time, that he would not remain and work the shingle-mill unless the same were put in a safe condition at once; that the defendant then promised and agreed to repair the mill, cover the saw, and put the passage-way in a safe condition, and by these promises induced the plaintiff to remain in his employment about the shingle-mill until he was hurt. If the complaint had stopped here, it might be held to state a cause of action, for it would then state a cause of action within the rule laid down and approved by courts of the highest authority, which hold that where the servant, having the right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances by the master that the danger shall be removed, such assurances remove all ground for holding that the servant, by continuing in the employment, engages to assume the risk. This doctrine is laid down in *Hough v. Railway Co.*, 100 U. S. 213, in a very elaborate and learned opinion by Mr. Justice Harlan, where the law is fully discussed, and many authorities cited. The doctrine certainly rests upon rational grounds, and is amply supported by writers upon the law of negligence, as a reference to the above opinion will show. It follows that it was the clear duty of the defendant to remove the danger or repair the defect in the passage-way, and negligence will not be imputed to the plaintiff if he continued his employment for a reasonable time to allow the defendant to remove the defects.

The real question in each case is, whether the master, under all the circumstances, had a right to believe, and did believe, that the servant waived his objection to the defect in the materials provided for the work, and assumed the risk, exempting the master from liability. "This is a question of fact, not of law; and it must be left to the jury, at least if not entirely

free from doubt. There can be no doubt that where a master has expressly promised to repair a defect the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept": 1 Shearman and Redfield on Negligence, 4th ed., sec. 215. It appears that the plaintiff remained in his employment after the defendant promised to make the saw and passage-way safe, and was then injured by slipping and falling upon the saw while going through the passage-way to tighten the belt. As a matter of law, we could not say this period was so long that it precluded all reasonable expectation that the defendant would make good his promise. The defendant would have a reasonable time to remove the defects, and the plaintiff should not be held to waive his objections to the machinery or assume any risk in respect to it while relying upon the defendant's promise to make it safe. But if the plaintiff did continue his employment for an unreasonable time after the defendant could have removed the defects, he would then be deemed to have waived his objections and assumed the risk of operating the machinery in the unsafe and dangerous condition in which it was. The difficulty with the complaint is, that it is alleged that the plaintiff—obviously meaning the defendant—had ample time and opportunity, and was abundantly able, to repair and put in a safe condition the machinery and apparatus between the time the plaintiff informed him of its defects and the time when the plaintiff was injured, but neglected and failed to do so, as was his duty, for the protection of the plaintiff. This allegation fairly implies that the plaintiff continued his employment beyond the period of time within which he might reasonably expect the defendant would keep his promise and put the machinery in proper condition. We must therefore hold the complaint defective, because it does not allege or show that the plaintiff was injured within such a time after the defendant's promise as it would be reasonable to allow for its performance under the circumstances; for if the plaintiff continued in the employment longer than there were reasonable grounds for expecting the defendant would remove the defects, and was then injured, he would assume the risk of the dangerous condition of the machinery as when he entered upon the service.

We hold the complaint fatally defective because it does not appear that the plaintiff was injured while he had a reasonable expectation that the defendant would keep his promise. The demurrer to the complaint should have been sustained for this reason.

The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

MASTER AND SERVANT — ASSUMPTION OF RISKS BY THE SERVANT. — A SERVANT ASSUMES THE ORDINARY risks incident to his employment: *Wilson v. Winona etc. R. R. Co.*, 37 Minn. 326; 5 Am. St. Rep. 851, and note 854; *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578, and note 592; *Norfolk etc. Ry Co. v. Cottrell*, 83 Va. 512; *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266; but he has a right to rely upon his employer's care, superior knowledge, and judgment, and may assume that the latter has taken all reasonable precautions to guard him from danger, and will not expose him to unnecessary risk: *Farren v. Sellens*, 39 La. Ann. 1011; 4 Am. St. Rep. 256, and note 264, with cases there collected. Compare *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733, and note; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep., and note; *Hosic v. Chicago etc. R. R. Co.*, 75 Iowa, 683; *ante*, p. 518, and note. An employee who remains in service after knowledge of a defect which augments the danger of his employment assumes the risk as increased by the defect: *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578, and note 592; unless his continuance is by reason of his master's promise to repair the defect within a reasonable time, which time has not expired: *Eureka Co. v. Bass*, 81 Ala. 200; 60 Am. Rep. 152, and note.

ROBINSON v. ROHR.

[73 WISCONSIN, 436.]

MUNICIPAL CORPORATIONS — OFFICERS — NEGLIGENCE — INDIVIDUAL LIABILITY. — Board of street commissioners of a city act in a ministerial capacity, and are individually liable for injuries to a person caused by the negligence of their employees in repairing and reconstructing a bridge; and the city itself is not liable where, instead of letting the work by contract to the lowest bidder, as required by the charter of the city, they resolve to do the work themselves, under the supervision of their committee and a superintendent appointed by them, in accordance with plans and specifications adopted.

ACTION by Ada H. Robinson against William H. Rohr and six others, constituting the board of street commissioners of the city of Watertown, to recover damages for personal injuries alleged to have been caused through the negligence of the defendants and their employees. The city was also made a defendant, but did not appear. The opinion states the facts.

Harlow Pease, for the appellant.

Gregory, Bird, and Gregory, and Charles H. Gardner, for the respondents.

ORTON, J. The above defendant, William Rohr, and six others are charged in the complaint as follows: They were constructing and repairing stone piers and abutments under the Main Street bridge over the Rock River, in the city of Watertown; and there was standing, in an upright position on said bridge, a large and heavy hoisting-machine, known as a derrick, which was placed there by them, and before that day had been used by them in repairing and constructing said piers and abutments. The plaintiff was walking along upon that portion of the bridge which was set apart for persons traveling on foot, and through the carelessness and negligence of the defendants, their agents, servants, and employees, said derrick was allowed to fall across and upon said bridge, and upon the plaintiff, while she was walking along as a traveler on said highway bridge, and without fault on her part; whereby she was greatly hurt, bruised, and injured.

The defendants by answer admit that the piers and abutments of said bridge were being constructed and repaired, but deny that they were constructing or repairing the same, and deny that it was through their fault, or that of their agents, servants, or employees, that the derrick fell upon the plaintiff, and that she was greatly injured thereby, or that she received any injuries by reason of their negligence, or that of their agents, servants, and employees; and deny that the plaintiff was without fault, and aver that her own negligence contributed to her injury. They allege that said bridge had been out of repair for some time, and needed repair and reconstruction; and that as the board of street commissioners of said city, in its collective and legislative capacity, they had duly let the work of repairing and constructing said piers and abutments to competent persons to do that work; and the said persons were then engaged in the due prosecution of said work, exercising due and proper caution in operating the said derrick.

The facts in respect to said mason-work on the piers and abutments, stated in respondents' brief, and proved on the trial, were as follows: The clerk of the city was directed by the defendants, in accordance with the requirement of section 8 of subchapter 9 of the city charter in respect to all such

work, to advertise for proposals for doing the mason-work and furnishing materials for the bridge according to the plans and specifications adopted by them as the board of street commissioners, to be received up to a certain date; and on that day the proposal of one Charles Baxter for doing said work and furnishing materials was accepted by them, and they directed a contract to be entered into with him according to said proposal, and that the said work be let to him, he being the lowest bidder for the same. But before any contract was entered into with him, and before, as they ascertained, he had acquired any rights in the same, by resolution of the defendants as such board, the whole matter was left open and undisposed of for their future action. Their committee, to whom the matter had been referred, reported plans and specifications of said mason-work and materials, and recommended that said work and furnishing materials be done by themselves, under the supervision of their committee on streets and bridges, and that a superintendent be appointed; and said resolution was accordingly adopted by them. In this manner, the work upon said bridge commenced and was carried on by the defendants through their superintendent and other persons employed by them, and under the supervision of their committee, up to the time the plaintiff was injured by the falling of the derrick by the negligence of their servants. No contract was ever let to any one to do said work, or to furnish materials for the same; but the defendants did the work, instead of a contractor obtained according to the requirement of the charter as the lowest bidder for the same. On these facts, the circuit court directed a verdict for the defendants, except the city of Watertown.

It will be seen that the facts proved do not support the answer as to letting the work to other persons. It may be said here that all the authorities cited by the learned counsel of the respondents have application only to the case made by the answer, and in no respect to that made by the facts proved. The same elementary authorities cited by them make the very distinction which here exists between the answer and the proofs. The board of street commissioners, when they determined upon the work and adopted the plans and specifications of it, acted as public officers, exercising judicial and legislative power, and they are not amenable to any one except the public for any errors, negligence, or mere misfeasance in the matters within their jurisdiction. In this case they

are not charged with any dereliction in these respects. But when, after adopting the plans and specifications, they undertake to carry them out practically, and do the work themselves, and employ agents and servants to execute the plans and specifications manually, then, if they are acting as officers at all, they are merely ministerial officers, and not judicial or legislative, and, according to the same authorities, are liable to third persons for their negligence or misfeasance, or, as the authorities say, as public officers they acted in a ministerial capacity, and are therefore liable: Cooley on Torts, 839-876. If, as public officers, they owe only a duty to the public, and are not liable to persons, yet if they so act as to owe a duty to individuals, then their negligence therein is an individual wrong which may be redressed by private action. In this case the defendants owed a duty to the traveling public, and to the plaintiff while traveling over the bridge, to look out for her personal safety, while they were managing the work through their servants. This is not a public but a private duty, which they must discharge properly or be liable to those injured by their negligence. As public officers, acting for the public alone, they are exempt from personal liability. The doctrine of *respondet superior* does not apply to such. But if, as the authors say, they engage in some special employment, and their duties are of a more private character, and concern individuals as well as the public, they are amenable to private actions: Wharton on Negligence, sec. 284, Shearman and Redfield on Negligence, secs. 166, 167. This distinction is plainly marked and easily applied. The authorities cited by the learned counsel of the respondents apply only to the first class, and therefore are not applicable to this case; such as *Squiers v. Village of Neenah*, 24 Wis. 588; *Hurley v. Texas*, 20 Id. 637; *Hamilton v. City of Fond du Lac*, 40 Id. 47; *Smith v. Gould*, 61 Id. 31. Special attention is called to *Alvord v. Barrett*, 16 Id. 175, as illustrating the rule contended for by the learned counsel. But in that case the court said: "If the town clerk had been guilty of any neglect of duty or misconduct, whereby the appellant had sustained damages, the case would have been different." So in *Harris v. Baker*, 4 Maule & S. 27, the trustees for lighting streets were not liable to a person injured by falling over a heap of dust deposited in the highway, because, the court said: "They were too far removed from the cause of it." But suppose the trustees had deposited the heap in the highway wrongfully

or negligently, they would not then have been too far removed from the cause of the injury. In *New Clyde S. Co. v. River Clyde Trustees*, Hay, Dec. 79, 14 Scot. Jur. 586, it is conceded that the remedy would be against the persons who committed the wrong. The defendants rejected the contractor, who would have been liable for such an injury, and took his place to do the work, and thereby assumed the liabilities of a contractor to those injured by the negligence of their servants. The board planned the ditch, and are not liable for their plan; but if the commissioners dug the ditch, and negligently left it unguarded, and a person falls into it in the dark, are they not liable? By personally and practically undertaking to do the work through servants of their own employment, they are brought into contact and relation with the traveling public and the plaintiff, and assume corresponding duties and obligations.

This is sufficient as to the principle which governs this case, treating the defendants as officers as well as operatives. In such case, it follows, as of course, if they are liable, the city is not so; and that cases in which it is held that the municipality is not liable for such a personal injury caused by negligence or wrong are authorities that the persons or officers who did the wrong, or were guilty of the negligence, are liable. In *Wallace v. City of Menasha*, 48 Wis. 79, 33 Am. Rep. 804, the city treasurer sold the property of one person for the tax of another. It was held that the city was not liable for such a tort. His acting *colore officii* made no difference. In that case, the doctrine and distinction as above stated, together with the above and other authorities, are fully and ably reviewed by Mr. Justice Lyon, and it is a case in point with this in principle. In *Uren v. Walsh*, 57 Wis. 98, it was held that the defendants were liable to personal action for unlawfully tearing down a fence to open a highway, and it made no difference that they pretended to act as public officers. This class of cases is distinguished from the cases cited by the learned counsel of the respondents by the chief justice in an able review of the doctrine. It was a personal wrong, for which the town was not liable, and is distinguished from those cases where the municipality is held liable, because, in such cases, it directed the act, or ratified it, or it was within its general powers. In that class of cases, the damages are the natural and proximate consequence of the illegal act, and not

independent act of negligence or of wrong, not necessary to the work, and committed while doing it, to the injury of third persons. For such an act of negligence or of wrong as that complained of the municipality was never held liable. The city of Watertown had nothing to do with it, never authorized or ratified it, and it was not within its general powers or for its benefit. The city might as well be held liable for an assault and battery committed by these commissioners while prosecuting this work. But treating the defendants as officers, and lawfully doing the work, they would be liable, and the city would not be. A city is not liable for injuries or damages caused by the neglect of its officers in the performance of their duties: *Schultz v. City of Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779; or for their misfeasance or malfeasance, or omission to perform their duties, or for negligence in its performance: *Little v. City of Madison*, 49 Wis. 605; 35 Am. Rep. 793. When an officer of a corporation performs an illegal act resulting in an injury to another, he is liable: *Peck v. Cooper*, 112 Ill. 192; 54 Am. Rep. 231. Whenever a person sued sets up a defense that he was an officer of the government, acting under color of law, it plainly devolves upon him to show that the law which he invokes authorized the particular act in question to be done, and that he acted in good faith: *Tweed's Case*, 16 Wall. 504. But where the issue is negligence, motives or good faith are immaterial: *Hover v. Barkhoff*, 44 N. Y. 113. Where an officer injures another while performing ministerial duties, he is liable: *Mills v. City of Brooklyn*, 32 Id. 489. For a personal injury caused by the negligence of several persons, they are severally or jointly liable: *Creed v. Hartmann*, 29 Id. 591; 86 Am. Dec. 341; *City of Peoria v. Simpson*, 110 Ill. 294; *Wright v. Compton*, 53 Ind. 337; *State ex rel. Reynolds v. Babcock*, 42 Wis. 138. These general propositions are indisputable, and, with the authorities, are taken from the brief of the learned counsel of the appellant. We conclude, therefore, that the plaintiff had a right to recover against the defendants, except the city of Watertown, and that the court erred in directing a verdict in their favor.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

LIABILITY OF PUBLIC OFFICERS TO PRIVATE INDIVIDUALS: See note to *Robinson v. Chamberlain*, 90 Am. Dec. 728.

STATE v. GROTTKAU.

[73 WISCONSIN, 589.]

CRIMINAL LAW — DISCHARGE ON HABEAS CORPUS — WRIT OF ERROR PROSECUTED BY STATE. — Writ of error will not lie in behalf of the state to review an order or judgment of a court of competent jurisdiction, in *habeas corpus* proceedings, discharging from custody a person convicted and imprisoned for crime; and it is immaterial whether such court issued the writ of *habeas corpus* in the first instance, or adjudicated the matter on *certiorari* to a court commissioner who issued the writ.

INDICTMENT of Paul Grottkau for riot. The prisoner was convicted of the offense in the municipal court of Milwaukee County, and on May 7, 1887, was sentenced to confinement at hard labor for one year in the house of correction. On May 14, 1887, before the execution of the sentence, that court granted a stay of execution, pending the determination of the case by the supreme court, to which it was brought by writ of error. Grottkau gave the required security, and was released from custody. The supreme court affirmed the judgment of the municipal court, and the *remittitur* from the former court was filed in the latter March 13, 1888. On April 5, 1888, Grottkau was committed to the house of correction, pursuant to the sentence. On May 8, 1888, he was brought before Court Commissioner Hugh Ryan, by virtue of a writ of *habeas corpus*, and a hearing was had. On May 12th, the commissioner made an order remanding Grottkau to the custody of the keeper of the house of correction, and dismissed the proceeding. The matter was removed by *certiorari* to the circuit court, which, on May 21, 1888, discharged Grottkau from custody. The state thereupon sued out a writ of error, and the supreme court, on the argument of the attorney-general alone, no appearance having been made for the defendant in error, held that execution of sentence having been stayed, and the prisoner released on bail pending the decision of the supreme court, the term of imprisonment did not commence until April 5, 1888. The order and judgment of the circuit court discharging the defendant in error from custody was therefore reversed. The opinion will be found reported in 73 Wis. 591. The defendant in error thereafter moved for a rehearing, contending that a writ of error did not lie at the suit of the state.

L. K. Luse, assistant attorney-general, for the state.

Moritz Wittig, Jr., and C. E. Monroe, for the defendant in error.

LYON, J. This case was decided at the last term on the argument of the attorney-general alone. For that reason we determined only the single question, When did Grottkau's term of imprisonment commence? On that question we adhere to the ruling then made.

The defendant in error now moves for a rehearing of the cause, and his counsel, in their argument, raise the question whether a writ of error lies at the suit of the state to bring to this court for review the order or judgment of the circuit court reversing the order of Commissioner Ryan and discharging the defendant in error from custody.

It was decided by this court twenty-five years ago, and the rule has never been questioned or doubted since, that a writ of error does not lie at the suit of the state to reverse a judgment for the defendant in a criminal prosecution, whether upon a verdict of acquittal or upon an issue involving a question of practice, as where final judgment was rendered for the defendant on a demurrer to a plea in abatement of the indictment: *State v. Kemp*, 17 Wis. 669. The case overrules, to some extent, the doctrine of *United States v. Salter*, 1 Pinn. 278, wherein it was said that if the court quashes the indictment or arrests judgment erroneously the prosecution may have a writ of error to reverse such decision.

Is the rule of *State v. Kemp* applicable to this case? We have concluded, after much deliberation, that the question must be answered in the affirmative. We can perceive no difference in principle between a case where, as in that case, the accused is discharged from custody without a trial because an issue of law on the pleadings had been determined in his favor, and the present case, in which the defendant in error was discharged from custody by the final order of the circuit court made in a proceeding on *habeas corpus*. The reasons why the state is remediless in the former case apply with equal force to the latter. To illustrate, suppose that in a criminal prosecution the trial court arrests judgment after conviction and dismisses the case on the ground that it has no jurisdiction thereof. So far as that prosecution is concerned, the order in that behalf, which results in the discharge of the accused from custody, is final, and the state is remediless. But suppose the court holds it has jurisdiction, and proceeds to sentence the accused to imprisonment, and some court of competent jurisdiction thereafter discharges him upon

habeas corpus, because, in its opinion, the trial court had no such jurisdiction. Both discharges in the cases supposed rest upon precisely the same ground. It being the settled law that the state cannot have a writ of error in the one case, it seems logically to follow that it ought not to have the writ in the other.

The only adjudication by this court which is claimed to be a direct authority for allowing a writ of error in the present case was made in *State ex rel. McCaslin v. Smith*, 65 Wis. 93. In that case a judgment had been rendered against Smith for the costs of a prosecution for larceny instituted by him against one Davis, which had failed. The judgment was so rendered pursuant to section 4791 of the Revised Statutes. Smith was imprisoned under an execution against his goods and person, issued on such judgment. On a *habeas corpus* he was discharged from custody by a court commissioner, and the circuit court, on *certiorari*, affirmed the order of discharge. McCaslin then suit out a writ of error from this court to obtain a review and reversal of the order of affirmance. It was held that he was entitled to the writ.

The judgment in the above case under which Smith was imprisoned is nominally in favor of the state, but really in favor of the county which was chargeable with such costs. It is a mere judgment for money, and is not distinguishable in principle from an ordinary judgment for tort in a civil action between individuals, or from a case in which a person is imprisoned for violation of or non-compliance with an order made for the enforcement of a private right or remedy, as distinguished from imprisonment for a criminal contempt. For a discussion of this distinction, see *In re Murphey*, 39 Wis. 298; *In re Pierce*, 44 Id. 411, and cases cited.

In the present case, the imprisonment of the defendant in error was for crime of which he had been duly convicted. This distinguishes it from the case of *State ex rel. McCaslin v. Smith*, *supra*, and renders the application of a different rule entirely proper. Hence, while we do not question the accuracy of the judgment in that case, but rather reaffirm it, we hold that when, as in the present case, a person convicted and imprisoned for crime is discharged from custody in a *habeas corpus* proceeding by a court of competent jurisdiction, the state cannot obtain a review of the order or judgment in that behalf by writ of error. And it is immaterial whether such court issues the *habeas corpus* in the first instance or adjudi-

cates the matter on *certiorari* to a court commissioner who issued the writ.

Inasmuch as the judgment of this court herein can only be upheld on the assumption that the writ of error was properly issued at the suit of the state, and that assumption now being negatived, it follows that the motion for a rehearing must be granted.

The question here decided is one of considerable general interest, but has probably ceased to be of any importance in this particular case. Grottkau's term of imprisonment commenced April 5, 1888, and his sentence is for one year. If the time he has been at large since his discharge on *habeas corpus* is not deducted from such term, the same will expire April 5, 1889. While we do not here decide the point, we are strongly inclined to the opinion that the term of Grottkau's punishment, after having once commenced, was not interrupted by such discharge, and hence that it will expire April 5, 1889.

The proposition upon which the motion for a rehearing is granted has been fully and ably argued by the learned assistant attorney-general, as well as by the learned counsel for the defendant in error, and has been much considered by the court. It is not at all probable that further argument will change our opinion. Hence, after the order for rehearing is entered, the clerk will enter a further order quashing the writ of error and dismissing the case.

Ordered accordingly.

HABEAS CORPUS. — A prisoner will not be discharged on a writ of *habeas corpus* because of errors committed by a court of competent jurisdiction: *Sennott's Case*, 146 Mass. 489; 4 Am. St. Rep. 344, and cases collected in note thereto 348; *State v. Neel*, 48 Ark. 282.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

STATE v. VANDERBILT.

[116 INDIANA, 11.]

COMMON SCHOOLS—RULES AND REGULATIONS.—Rule requiring pupils to pay for school property which they may wantonly and carelessly break or destroy is not reasonable, and teachers have no right to make such rule and enforce it by chastisement of the pupils.

PLEADING AND PRACTICE—RECORD ON APPEAL.—Section 1846, Revised Statutes of Indiana, 1881, provides that “the prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the supreme court,” and that “the bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved. Section 1883 provides that “in case of an appeal from a question reserved on the part of the state, it shall not be necessary for the clerk of the court below to certify in the transcript any part of the proceedings and record, except the bill of exceptions and the judgment of acquittal,” and that “when the question reserved is defectively stated, the supreme court may direct any part of the proceedings and record to be certified to them.” Under these provisions, where the clerk sets out the affidavit on which the accused was tried before a justice, together with the proceedings in the circuit court, the supreme court will consider the affidavit as part of the record, and ascertain therefrom what the charge was, if it is not shown by the bill of exceptions.

L. T. Michener, attorney-general, for the state.

C. V. McAdams, for the appellee.

ZOLLARS, J. Appellee was tried and acquitted in the court below upon a charge of assault and battery. A bill of exceptions, presented by the prosecuting attorney, and signed and filed at the time the exceptions were taken, shows that the

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STATE v. VANDERBILT.

state, by the prosecuting attorney, excepted an instruction by the court, and also excepted of the court to give an instruction asked by attorney.

The case seems to have originated before peace. The clerk, in making the record for set out the affidavit upon which appellee was was filed in his office by the justice of the p from his court, together with the proceeding court, including the verdict and judgment o also the bill of exceptions.

Counsel for the state contend that the court the giving of the one instruction and in the ref Counsel for appellee, on the other hand, contend no question before this court for decision, for the appeal was not taken in the manner pre statute.

He insists that this court cannot determine was error in the giving or refusal of the instruct is in some proper way advised of the nature upon which appellee was tried, and that we cannot the bill of exceptions to the affidavit set out in determine what the charge was.

Section 1846, Revised Statutes of 1881, provides prosecuting attorney may except to any opinion during the prosecution of any cause, and reserve law for the decision of the supreme court. The exceptions must state clearly so much of the record as may be necessary for a fair statement of reserved."

Section 1883, Revised Statutes of 1881, provides in case of an appeal from a question reserved on the state, it shall not be necessary for the clerk of the court to certify in the transcript any part of the previous record except the bill of exceptions and the judgment. When the question reserved is defective the supreme court may direct any part of the previous record to be certified to them."

Applied to a case like this, the strict construction of the above sections of the statute by appellee's counsel is sustained by our cases. They are, in effect, the appeal by the state, what is a part of the record and the bill of exceptions need not be embraced in such

where the question of law reserved is shown by the record proper, no bill of exceptions is necessary: *State v. Day*, 52 Ind. 483; *State v. Bartlett*, 9 Id. 569; Gillett's Criminal Law, sec. 1004.

Those cases require that in this case we shall regard the affidavit as a part of the record, and that we shall look beyond the bill of exceptions to it to ascertain what the charge against appellee was.

Looking to the record before us as a whole, we think that it sufficiently presents the question as to whether or not a teacher of a public school may establish, and enforce by chastisement, a rule requiring pupils to "pay for the wanton and careless destruction of school property."

The bill of exceptions shows that the state, by the prosecuting attorney, asked the court to charge the jury "that a teacher in a public district school has no right to inflict a money penalty upon a pupil for the accidental destruction or breakage of school property, and enforce the same."

That instruction the court refused, and over the exception of the state, gave the following instruction: "A rule of the teacher requiring that the pupil shall pay for the wanton and careless destruction of school property is a reasonable rule, and one that the teacher has the right to enforce."

It is not necessary that the evidence should be in the record to enable us to pass upon these instructions, if in any case on appeal by the state the evidence can be examined, a question which we leave where it is left by our cases. Without speaking of the instruction refused, which is the opposite of that given, the latter, if erroneous, would be erroneous under any supposable state of the evidence.

Under our cases, a school-teacher has the right to exact from pupils obedience to his lawful and reasonable demands and rules, and to punish for disobedience, "with kindness, prudence, and propriety." And where, in such case, the punishment is not administered with unreasonable severity, a proceeding for an assault and battery cannot be maintained against the teacher: *Danenhoffer v. State*, 69 Ind. 295; 35 Am. Rep. 216.

The rule or rules to which the teacher may thus enforce obedience must, however, be reasonable; and whether or not such rules are reasonable is ultimately a question for the courts: *Fertich v. Michener*, 111 Ind. 472; 60 Am. Rep. 709.

We think that a rule requiring pupils to pay for school

property which they may wantonly and carelessly break or destroy is not a reasonable rule, and therefore that teachers have no right to make and enforce such a rule by chastisement of the pupils. The "wanton and careless destruction," etc., amounts to nothing more than carelessness: *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318; *Terre Haute etc. R. R. Co. v. Graham*, 95 Ind. 286, 296; 48 Am. Rep. 719.

Carelessness on the part of children is one of the most common, and yet one of the least blameworthy, of their faults. In simple carelessness there is no purpose to do wrong. To punish a child for carelessness in any case is to punish it where it has no purpose or intent to do wrong or violate rules.

But beyond this, no rule is reasonable which requires of the pupils what they cannot do. The vast majority of pupils, whether small or large, have no money at their command with which to pay for school property which they injure or destroy by carelessness or otherwise. If required to pay for such property, they would have to look to their parents or guardians for the money. If the parent or guardian should not have the money, or if they should refuse to give it to the child, the child would be left subject to punishment for not having done what it had no power to do.

Without giving other reasons for our conclusion that the rule in question was an unreasonable rule, our judgment is, that the court below erred in giving the instruction above set out, and that this appeal must be sustained, and the appellee taxed with the costs on appeal.

RIGHT OF SCHOOL-MASTER TO MAKE RULES and inflict punishment on pupils: *Van Vactor v. State*, 113 Ind. 276; 3 Am. St. Rep. 645, and note 650; and cases cited in the opinion *supra*.

BROWN v. GROVE.

[116 INDIANA, 84.]

DIVORCE — DECREE OBTAINED BY FRAUD ANNULLED. — Where a petition for divorce is filed by the husband in the name of the wife, but without her knowledge or consent, at a time when she is ill and almost blind, and she has no notice nor knowledge of the proceedings for more than twenty years after they are instituted, the decree will be annulled as fraudulent and void.

WITNESSES — COMPETENCY OF WIFE AS WITNESS TO ANNUL DECREE OF DIVORCE. — In an action to annul a decree of divorce, the wife is a com-

petent witness to testify as to what she did or did not do concerning the petition in the divorce suit; and though she may be incompetent to testify as to some of the matters involved, it is error to rule that she is totally incompetent.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — In an action to annul a decree of divorce, a new trial will not be granted on the ground of newly discovered evidence when the utmost force that can be allotted to such evidence is that it tends to impeach the plaintiff.

L. Howland and Leon O. Bailey, for the appellants.

Hezekiah Dailey and John F. McCray, for the appellee.

ELLIOTT, J. It is alleged in the complaint of the appellee that she was married to Henry W. Grove in 1851; that in March, 1863, a decree of divorce was obtained by fraud; that the petition for divorce was filed in her name without her knowledge or consent; that she did not authorize the solicitor whose name is signed to the petition purporting to have been filed by her to file any petition; that the petition was filed and procured, without her knowledge, by Henry W. Grove; and that, on the day it was filed, he appeared in person and filed an answer.

It is further alleged that at the time the petition was filed she was ill and almost blind; that soon after the decree was entered she became and has since been totally blind, and for a great part of the time has been an inmate of the county poor-house.

It is also averred that she had no notice or knowledge of the proceedings until long after the death of Henry W. Grove, and that he died on the seventh day of December, 1883.

The complaint is good. A husband who procures a petition to be filed in the name of his wife against himself without her knowledge, and answers the complaint filed by his own procurement, perpetrates a fraud upon her and upon the court. Such conduct courts abhor. It would be a mockery to uphold a decree obtained by such a fraud. Courts have inherent power to annul decrees obtained by means such as those resorted to by Henry W. Grove: *Nealis v. Dicks*, 72 Ind. 374; *Cavanaugh v. Smith*, 84 Id. 380; *Earle v. Earle*, 91 Id. 27.

The appellee was neither plaintiff nor defendant. Henry W. Grove was the sole party to the suit. In truth, there was no suit, for there was no plaintiff. It is an ancient maxim that "fraud vitiates everything"; and it is impossible to conceive of a case to which that maxim more strongly and justly applies than the one before us. The proceeding is utterly

destitute of force. The infirmity is remediless. The defect is incurable.

The contention of counsel that the appellee was bound to know of the existence of the decree because it was of record is not only without strength, but is without plausibility. It would be strange indeed if a woman was bound to examine the records to ascertain whether she had herself ever instituted a suit for divorce.

The appellee was a competent witness. She had a right to testify as to what she herself did or did not do concerning the petition in the divorce suit. What she did or did not do was a matter neither within the spirit nor the letter of the law prohibiting parties from testifying where heirs are interested. It may be true that, as to some other matters, she was not competent, but the only objection presented was as to her competency to testify at all, and that objection was properly overruled.

The only question we are required to decide, and the only question we do decide, is, that upon some of the matters involved, the appellee had a right to testify, and that, as she was as to those matters a competent witness, it would have been error to have ruled her totally incompetent.

The only argument made by appellants' counsel upon this point is this: "The heirs are parties. Her claim affects the estate, and, under the statutes of this state, the husband being dead, the plaintiff was incompetent to testify as to matters prior to her husband's death." No authorities are cited, nor other reasons adduced, and what we have said disposes of the question as it is presented to us. This suit, it must be remembered, is one to annul a decree of divorce, and, as to many matters, the appellee was a competent witness, and the only question presented is, whether she was competent to testify at all.

There was no error in excluding the note and mortgage executed to Mr. Goodwin. There was no evidence that they were executed by her, and without such evidence they were not admissible, since to make them competent for any purpose it was indispensably necessary to prove that they were executed by her.

The appellants assert that they were entitled to a new trial, upon the ground of newly discovered evidence, and thus present that point: "This reason was highly material and important to the appellants. It clearly establishes the identity of

plaintiff with the Emily J. Grove who borrowed the money from Goodwin the same year her divorce was granted, representing herself as a divorced and single woman." This cannot justly be regarded as such a presentation of the question as the rules of practice require, since it does not enable us to determine the specific grounds upon which the ruling of the trial court is assailed. We have, however, given the question attention, and we are clear that the utmost force that can be allotted the newly discovered evidence, if, indeed, even so much can be given it, is that it tends to impeach the appellee. Over and over again it has been decided that a new trial will not be granted to admit the introduction of impeaching evidence.

Counsel state some other questions upon the rulings in admitting and excluding evidence which they say the record presents, but they do not argue them, and they are, therefore, deemed waived.

The evidence fully sustains the finding of the trial court.

We think it proper to say that the issue tried and determined was, whether the appellee had a right to have the decree of divorce annulled, and that is the only issue upon which our judgment or that of the trial court is absolutely and directly conclusive. Whether property rights acquired upon the faith of the validity of the decree are affected, we have not inquired, and, of course, have not decided. All that we do decide is, that Mrs. Grove had a right to relief against the decree procured by fraud. When she claims, should she ever do so, property rights, then other questions may arise, but now we decide only that she had a right to be relieved from the fraudulent decree.

Judgment affirmed.

DIVORCE. — A DECREE OF DIVORCE OBTAINED BY A HUSBAND through fraud upon the wife will be set aside: *Edson v. Edson*, 108 Mass. 590; 11 Am. Rep. 393; *Allen v. Maclellan*, 12 Pa. St. 328; 51 Am. Dec. 608, note 611; note to *Greene v. Greene*, 61 Am. Dec. 461. Courts have an inherent power to modify and vacate their own judgments in a direct proceeding for that purpose; and judgments in divorce suits stand on the same footing, except in so far as the courts must be governed by statutory restrictions: *Nicholson v. Nicholson*, 113 Ind. 131. Although a plaintiff in a divorce suit has remarried, an aggrieved party may, under the Minnesota statutes, bring an action to annul a divorce procured by fraud: *Bometa v. Johnson*, 38 Minn. 230. A judgment by default adjudging a marriage void may be vacated at the instance of the defendant, on the ground that it was fraudulently procured: *Blank v. Blank*, 107 N. Y. 91. Where a husband filed an application for admeasurement of dower in the realty of his deceased wife, and the defense urged

was that said wife had been divorced from him by a decree rendered in another state, it was competent for the husband to assail such decree on the ground of a want of jurisdiction in the court rendering it: *Neff v. Beauchamp*, 74 Iowa, 92. The law of marriage, as administered by the courts, so far as property interests are concerned, is founded upon principles of business, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance: *Piper v. Hoard*, 107 N. Y. 67; 1 Am. St. Rep. 785.

NEW TRIAL. — **NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE** tending to impeach a former witness will not be granted: *State v. Carr*, 21 N. H. 166; 53 Am. Dec. 179, and note 184, 185. A new trial will not be granted on the ground of newly discovered evidence when such evidence is merely cumulative, and not conclusive in its character: *City of Sterling v. Merrill*, 124 Ill. 522; *Brooks v. Dutcher*, 22 Neb. 644; *Sabine etc. R'y Co. v. Wood*, 69 Tex. 679; *Campbell v. Holland*, 22 Neb. 588; *Hart v. Jackson*, 77 Ga. 493; *Smith v. Watson*, 82 Va. 712; *Erskine v. Duffy*, 76 Ga. 602. As a ground for a new trial, the discovery of new testimony is tolerated rather than favored, because of its liability to abuse and its tendency to mislead: *Id.* A new trial will not be granted on the ground of newly found evidence, where due diligence would have discovered such evidence before judgment and trial: *Allen v. Bond*, 112 Ind. 523; *Du Souchet v. Dutcher*, 113 Id. 249. To entitle one to a new trial, newly discovered evidence must be material, not merely cumulative, and not such as due diligence might have previously discovered: *Booth v. McJilton*, 82 Va. 827.

TOWN OF KNIGHTSTOWN v. MUSGROVE.

[116 INDIANA, 121.]

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE OF DRIVER OF CARRIAGE. —

Where one accepts the invitation of another to ride in his carriage, and thereby becomes in effect his comparatively passive guest, without authority to direct or control the conduct or movements of the driver or conveyance, and without reason to suspect his prudence or competency to drive in a careful and skillful manner, his want of care should not be imputed to the guest, so as to deprive the latter of his right to compensation from a city whose neglect of duty in obstructing the street has resulted in his injury.

NEGLIGENCE. — **ONE WHO SUSTAINS AN INJURY**, without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty caused the injury, even though the negligence of some third person with whom the injured person was not identified as above may have contributed thereto.

NEGLIGENCE. — **BEFORE CONCURRENT NEGLIGENCE** of a third person can be interposed to shield another whose neglect of duty has caused an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was,

upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured.

MUNICIPAL CORPORATIONS—DUTY TO KEEP STREETS IN REPAIR.—It is the duty of a corporation to keep its streets in such condition that persons using them properly, who are not so deficient in reasonable prudence and ordinary care as to bring injury upon themselves, can do so without peril.

L. P. Newby, and Mellett and Bundy, for the appellant.

Shelton and Woods, and Hernly and Brown, for the appellee.

MITCHELL, J. Lucinda Musgrove sued the town of Knightstown to recover damages for injuries alleged to have been sustained by her on the first day of July, 1886, without any fault on her part, while riding along a public street in the above-mentioned town, in which there was a dangerous unguarded obstruction.

There was a trial by jury, and a verdict and judgment in favor of the plaintiff for seven hundred dollars.

The evidence tended to show that two or more loads of gravel had been hauled upon the street by the direction of the authorities, late in the evening of the day on which the accident happened, and that they had been left in such manner as to make a gravel heap eighteen or twenty inches in height, and that there were no lights or other arrangements to prevent persons lawfully using the street from running upon the obstruction caused by the gravel. The plaintiff and her niece, a girl some sixteen years old, while riding in the evening after dark, for recreation, upon the invitation of a Mr. Hunter, were driven upon the obstruction thus left, and thrown out of the carriage, which was overturned. Hunter was the owner of the horse and vehicle, and had them in his charge at the time of the accident.

At the trial, the defendant offered to prove that Hunter had been at the place where the gravel was unloaded on the evening of the accident, and that he talked with the men who hauled it about leaving it there in the condition in which it was left. The object of the testimony was to show contributory negligence on the part of Hunter, with a view of insisting that the plaintiff was so identified with him as that his negligence should be imputed to her. The testimony having relation to that subject was all excluded, and it is now urged that

any reason to suspect, that Hunter was not a prudent, safe, and competent driver; but assuming that the excluded evidence would have shown that Hunter was negligent, the claim is, that his neglect ought to be imputed to the plaintiff, and that her right of recovery should have been thereby defeated, notwithstanding the neglect of the defendant. *Thorogood v. Bryan*, 8 Com. B. 115, is perhaps the leading case in support of the doctrine upon which a reversal is claimed. It appeared in that case that a passenger who had alighted from an omnibus was run down and fatally injured by an omnibus belonging to another line, which came up at the moment. The jury were instructed to the effect that if they should find that the negligence of the driver of the vehicle in which the deceased was a passenger, in not drawing up to the curb in such manner as to afford him a safe place to alight, had contributed to the injury, their verdict must be for the defendant, although the driver of the omnibus owned by the latter was also guilty of negligence. The doctrine of this case, and of those which follow it, ascribe to the passenger the negligence of a driver over whom the passenger has no control. The authority of the case has been greatly impaired in England by criticisms upon it in later cases, and the courts of this country, with but one or two exceptions, now hold the principles upon which it rests wholly indefensible: *Little v. Hackett*, 116 U. S. 366; *Wabash etc. R'y Co. v. Shacklet*, 105 Ill. 364; 44 Am. Rep. 791; *Borough of Carlisle v. Brisbane*, 113 Pa. St. 544; 57 Am. Rep. 483, and note; *Street Railway Co. v. Eadie*, 43 Ohio St. 91; *Philadelphia etc. R. R. Co. v. Hogeland*, 66 Md. 149; 59 Am. Rep. 159; *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178; *Battishill v. Humphery*, 64 Mich. 494; *Nesbit v. Town of Garner*, 75 Iowa, 314; *ante*, p. 486; *Follman v. City of Milwaukee*, 35 Minn. 522; 59 Am. Rep. 340; *New York etc. R. R. Co. v. Steinbrenner*, 47 N. J. L. 161; 54 Am. Rep. 126; *Robinson v. New York etc. R. R. Co.*, 66 N. Y. 11; 23 Am. Rep. 1; *Dyer v. Erie R'y Co.*, 71 N. Y. 228; *Masterson v. New York etc. R. R. Co.*, 84 N. Y. 247; 38 Am. Rep. 510.

Without entering upon a review of the cases, it is sufficient to say the general principle deducible from the decisions is, that one who sustains an injury without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compen-

sation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the injured person was not identified as above may have contributed thereto: Beach on Contributory Negligence, sec. 33.

Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him.

In a case like the present, where one accepts the invitation of another to ride in his carriage, thereby becoming in effect his comparatively passive guest, without any authority to direct or control the conduct or movements of the driver, or without reason to suspect his prudence or competency to drive in a careful and skillful manner, there is no reason why the want of care of the latter should be imputed to the former, so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury.

As was in effect said in *Brannen v. Kokomo etc. Co.*, 115 Ind. 115, 7 Am. St. Rep. 411, this court has heretofore adopted and followed the line of decisions which hold that in such a case negligence will not be so imputed: *Town of Albion v. Hetrick*, 90 Id. 545; 46 Am. Rep. 230; *Terre Haute etc. R. R. Co. v. McMurray*, 98 Ind. 358 (369); 49 Am. Rep. 752.

In *Brannen v. Kokomo etc. Co.*, *supra*, the conclusions above stated were distinctly recognized. It appeared, however, in that case, that the owner and driver of a team, in whose wagon the plaintiff, with others, was seated, attempted while in a state of intoxication to run the toll-gate without paying toll. Inasmuch as it did not appear but that the plaintiff knew of and acquiesced in the driver's purpose to commit the contemplated wrong, it was properly held, within the conclusions above declared, that he was so co-operating with the

driver as that in the absence of exculpatory evidence the act of the driver was the act of the plaintiff. The principle which controlled in the decision of that case is not applicable here. In some jurisdictions attempts are sometimes made to distinguish between the rights of one who is injured while being carried as a passenger in a public conveyance, and when riding in a private conveyance. There does not seem to be any substantial ground upon which to rest such a distinction. The inquiry in either case must be, Was the relation of the person whose negligence is sought to be attributed to the person injured such that the latter had at least an equal right to direct and control the movements of the conveyance, or that he would have been jointly liable to a third person for the consequences of the negligent conduct of the former?

The plaintiff was lawfully using the street at the time she suffered the injury. It was the duty of the corporation to keep the street in such condition that persons using it properly, who were not so deficient in reasonable prudence and ordinary care as to bring injury upon themselves, could do so without peril.

It should be observed that the doctrine of imputable negligence, as applicable to the relation of parent and child, and other kindred relations, which has been the subject of much recent discussion, is not involved in the facts of the present case, although the conclusions reached might seem to cover cases involving that relation, especially where the action is by an infant. That question, is, however, to be considered open for examination when it arises.

The evidence tends to sustain the verdict.

The judgment is therefore affirmed, with costs.

MUNICIPAL CORPORATIONS. — DUTY TO KEEP STREETS IN REPAIR, and liability for neglect of such duty: *City of Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594; *Clark v. City of Richmond*, 83 Va. 355; 5 Am. St. Rep. 281; *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32; *Turner v. Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453, and notes to these cases.

ONE WHO IS INJURED BY THE JOINT NEGLIGENCE of a private person, with whom he is riding by invitation, and a third person is not chargeable with the negligence: *Borough of Carlisle v. Brisbane*, 113 Pa. St. 544; 57 Am. Rep. 483, and extended note 488-511; *Brannen v. Kokomo etc. Co.*, 115 Ind. 115; 7 Am. St. Rep. 411, note 417. But see *Township of Crescent v. Anderson*, 114 Pa. St. 367; 60 Am. Rep. 367. *Thorogood v. Bryan*, 8 Com. B. 115, which was referred to and dissented from in the principal case, has been overruled in the case of *The Bernina*, L. R. 12 P. D. 58.

NEGLECT, IMPUTED — INSTANCES OF: See note to *Nesbit v. Town of Garner*, *ante*, p. 486.

PADDOCK v. WATTS.

[116 INDIANA, 146.]

MALICIOUS PROSECUTION. — IN ORDER TO RECOVER DAMAGES for instituting or prosecuting a criminal action which has terminated in plaintiff's acquittal, it must be shown that the action was instituted in malice and without probable cause.

MALICIOUS PROSECUTION. — WHERE A CRIMINAL PROSECUTION IS COMMENCED under circumstances which make it apparent that the prosecutor had some collateral purpose in view, rather than the vindication of the law, as where an agent has instituted a civil action against his principal to settle a dispute about a check, and the principal charges the agent with embezzlement of the check, upon which charge the agent is acquitted, a verdict against the principal for malicious prosecution without probable cause, it being shown that the check could not have been received by the agent or for his benefit, will not be set aside or disturbed.

MALICIOUS PROSECUTION. — INSTRUCTION DEFINING PROBABLE CAUSE for prosecution, and stating that if such prosecution was false and malicious, and instituted without reasonable inquiry, and without the existence of such an apparent state of facts as would have induced a reasonable and prudent man to believe plaintiff guilty of the crime charged, then the verdict must be in his favor, is proper.

MALICIOUS PROSECUTION. — IN THE ABSENCE OF A MOTION FOR A VENIRE DE NOVO or in arrest of judgment on a general verdict against three defendants for malicious prosecution, an objection to rendition of judgment against two of them, after denying a new trial to them, and granting it to the third, will not raise the question of error in the proceedings.

MALICIOUS PROSECUTION. — In an action of malicious prosecution, it is competent for defendant to show, in order to disprove malice, that in instituting the action he acted under the advice of competent counsel, and where he lays all the facts before the latter and acts in good faith upon his opinion, he is not liable, though it transpires that he was mistaken.

MALICIOUS PROSECUTION — EVIDENCE. — Where in an action for malicious prosecution the prosecuting attorney testifies that upon the facts as stated to him he, as a lawyer and an officer, advised the institution of the prosecution, it is competent to ask him, as an expert, whether, if the facts upon which he proceeded had been changed in a certain manner, he would have advised the institution of the proceedings.

CRIMINAL prosecution. The thirteenth instruction mentioned in the opinion is as follows: "Now, if you find, from the evidence, that the defendants, or either of them, instituted the prosecution complained of, and that it was false, and that they, or either of them, maliciously and without first having made reasonable inquiry, and without the existence of such an apparent state of facts as would have induced a reasonably intelligent and prudent man to believe Watts guilty of the crime charged, then you shall find for Watts, and assess his damages accordingly."

I. N. Pierce, T. W. Harper, and John G. Williams, for the appellants.

C. F. McNutt, J. G. McNutt, Davis and Davis, and S. R. Hamill, for the appellee.

MITCHELL, J. This was an action by James W. Watts against William, Benjamin F., and David E. Paddock, to recover damages for an alleged malicious prosecution instituted by the Paddocks against the plaintiff, Watts, in the Vigo circuit court.

The plaintiff charged that the defendants unlawfully, wrongfully, maliciously, and without probable cause, procured an indictment to be found and returned against him by the grand jury of Vigo County, in which the plaintiff was charged with the crime of embezzlement. It was alleged that the plaintiff had been arrested and tried upon the charge so preferred, and that he had been found not guilty, and discharged accordingly.

The defendants joined in pleading the general issue. There was a verdict for the plaintiff against all the defendants for \$750, upon which judgment was rendered against William and Benjamin F. Paddock, over their joint motion for a new trial, while David E. Paddock was awarded a new trial upon his separate motion.

It is contended on behalf of the appellants, with much earnestness, that the verdict is not sustained by the evidence. It appears that the defendants were partners, in the summer of 1882, engaged in the milling business in the city of Terre Haute. They employed the plaintiff to purchase wheat, the defendants agreeing to furnish the money and to pay the plaintiff a commission of three cents per bushel on one kind of wheat, and to share the profits equally with him on all the wheat of another kind which he should purchase for them. Considerable quantities of wheat were purchased, and a large sum of money furnished under this arrangement, which was continued until in the autumn of 1882. After the plaintiff ceased purchasing wheat, an accounting was attempted between the parties, and a dispute arose concerning a certain check drawn by Paddock & Co. in favor of the plaintiff for one thousand dollars upon the First National Bank of Terre Haute. That a check for that amount was drawn payable to Watts or bearer on the twenty-sixth day of July, 1882, and that it was paid by the bank on that day to some one, is not disputed.

Watts had no account of it on his books, and according to his testimony he disputed the fact of ever having received the check, or the money it called for, although the amount was charged to him on the books of Paddock & Co. Failing to arrive at a satisfactory adjustment of their affairs, Watts commenced a civil suit against Paddock & Co. for damages growing out of an alleged violation of their contract, after which, at the instigation and upon the testimony of the appellants, the grand jury of Vigo County returned an indictment charging him with having embezzled the appellant's money and checks. After hearing the evidence on behalf of the state, the court directed a verdict of acquittal, and this ended the criminal prosecution, which is now alleged to have been begun maliciously and without probable cause.

In order to sustain an action to recover damages for instigating or prosecuting a criminal action which has terminated in the plaintiff's acquittal, it must be shown that the defendant instituted the action in malice and without probable cause. The essential ground of the action is, that a criminal prosecution has been instituted and carried on without probable cause. In the absence of probable cause, malice may be implied: *Pennsylvania Co. v. Weddle*, 100 Ind. 188; *Stone v. Crocker*, 24 Pick. 81.

Whether there was probable cause for the criminal prosecution instituted by the defendants depends upon whether or not the above-mentioned check for one thousand dollars, drawn on the twenty-sixth day of July, 1882, by Paddock & Co., in favor of Watts, was ever delivered to and the amount of money for which it called properly charged against him on the books of Paddock & Co. If it was, or if, after such reasonable and proper inquiry as prudent persons ought to make, the defendants honestly believed it had been, there may have been probable cause for the prosecution. If it was not, and the defendants ought or might have known the facts, the prosecution was commenced without probable cause. There was evidence tending to show that Watts never received the check nor the money; that he was not in the city of Terre Haute within banking hours on the day on which the check was drawn by the defendants and paid by the bank. One of the firm of Paddock & Co. testified that he drew the check, payable as above, and delivered it to Watts in person on the day on which it bears date. This the latter denied. He also produced evidence corroborative of his theory, showing that

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the check could not have been paid to which the bank paid it. If it was true, as contended by Watts, that Paddock & Co. drew one thousand dollars, payable to James V. Watts, and never delivered it to him, or to any one for his benefit, that they charged the amount of the check against him on their books without his consent, and then caused him to be prosecuted for perjury, while he disputed that item of account, while he was prosecuting a civil action against them, claiming that they owed him, then, of course, the jury was supported by the evidence. The court accepted the theory put forward by Watts, and said that it finds no support in the evidence.

Where a criminal prosecution is commenced in circumstances which make it apparent that the prosecution is for a collateral purpose in view, rather than the public interest, as where a prosecution was commenced to compel the surrender of notes about which there was a dispute, the finding of a want of probable cause will be sufficient. *Ball v. Bates*, 50 Me. 308; *Brooks v. Warwick*, 100 Mass. 219; *Donald v. Rooke*, 2 Bing. N. C. 219.

We cannot reverse the judgment upon a re-examination of the instructions given to the jury, or a consideration of the objections made to them, but we must lead to the conclusion that the court committed an error in that connection which was prejudicial to the defendant, and that the contention that the thirteenth instruction was not supported by the evidence is not, in our opinion, sustained.

The point is made in the brief that the error in rendering judgment against the appellants, and Benjamin F. Paddock, over their objection, in granting a new trial to their co-defendant, David Watts, was prejudicial.

If there was any impediment in the way of granting a new trial, or a judgment after granting a new trial to one who was found jointly liable, it was because the judgment was defective.

Ordinarily, questions of this character are presented by moving for a *venire de novo*, unless the error, including the verdict, is so defective as that a new trial can properly be rendered, when a motion in arrest of judgment is made. *Boor v. Lowrey*, 103 Ind. 468; *Boor v. Lowrey*, 103 Ind. 468.

In the present case, it is conceded that the

either for a new *venire* or in arrest. It is contended, however, that the objection made by the appellants to the rendition of judgment against them, after a new trial had been granted their co-defendant, performed substantially the same office as a motion in arrest. We do not concur in this view, nor are we to be understood as conceding that a motion in arrest would have raised the question in the present case if one had been made. It is not necessary, however, to decide that question.

During the progress of the trial, the prosecuting attorney, who, upon the facts as communicated to him by the appellants, advised the institution of a criminal prosecution against Watts, after having testified to that effect in appellants' behalf in chief, was asked the following question on cross-examination: "State if you had known that he still disputed the payment of the check, and disputed that he got it, would you have given the advice you did?" To which the witness responded that he "would not."

It was competent for the defendants, in order to disprove malice, to show that in instituting criminal proceedings they acted under the advice of competent counsel. Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action, even though it turn out that he was mistaken. But in order that he may obtain immunity, he must have made a full and fair statement of all the facts known to him: *McCarthy v. Kitchen*, 59 Ind. 500, and cases cited; *Center v. Spring*, 2 Iowa, 393.

The prosecuting attorney having testified that, upon a certain hypothesis or state of facts communicated to him by the appellants, he, as a lawyer, and an officer of the law, advised the institution of criminal proceedings against Watts, it was competent to ask him, as an expert, whether or not, if the hypothesis or facts upon which he proceeded had been changed in the manner indicated by the question, he would have arrived at a different conclusion. This was only another way of showing the materiality of the facts assumed to have been withheld from the prosecuting attorney.

We have found no error. The judgment is affirmed, with costs.

MALICIOUS PROSECUTION.—MALICE AND WANT OF PROBABLE CAUSE must be alleged and proved to entitle a plaintiff in an action for malicious prosecution to recover damages: *Dickinson v. Maynard*, 20 La. Ann. 66; 96 Am. Dec. 379, and note; *Ross v. Innis*, 35 Ill. 487; 85 Am. Dec. 373, and note 361. A declaration in an action for malicious prosecution which does not

over the want of a probable cause is bad on demurrer: *Turner v. Turner*, 1 Tenn. 387.

MALICIOUS PROSECUTION. — ACTING ON THE ADVICE OF COUNSEL IN THE COMMENCEMENT of proceedings is, as a general rule, a defense to an action for malicious prosecution: *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521, at note 525; *Johnson v. Miller*, 69 Iowa, 562; 58 Am. Rep. 231. But in a suit for malicious prosecution the fact that the prosecutor acted on the advice of counsel, though admissible in evidence for the defendant, is not conclusive on the question of malice; and whether there was malice and the want of probable cause must be determined by the jury from a consideration of all the facts: *Glasgow v. Owen*, 69 Tex. 167. Where in an action for malicious prosecution the court instructed that the defendant was not liable if before beginning the prosecution he had laid the facts before his attorney and acted in good faith upon the advice of such attorney, and himself believed that there was cause for the prosecution, and in response to special interrogatories, the jury found the first two conditions for the defendant but the third one was not specially submitted to them, and the general verdict was for the plaintiff, the effect of the general verdict was that defendant did not himself believe there was probable cause for the prosecution, as this was not inconsistent with the special findings: *Acton v. Coffman*, Iowa, 17. The advice of counsel does not of necessity shield one against charge of malicious prosecution, but it will have that effect if the facts acted upon are fully and correctly stated to counsel, and if there is nothing in the case to show a want of good faith: *Mesher v. Iddings*, 72 Iowa, 553.

WHEELER v. CITY OF PLYMOUTH.

[116 INDIANA, 153.]

MUNICIPAL CORPORATIONS — LIABILITY FOR ACTS OF LICENSEE. — City having an ordinance prohibiting the use of gunpowder, but allowing the mayor to grant permission to use it on certain occasions, is not liable for damages for injury caused by a licensee, in the absence of proof that the authorized act was intrinsically dangerous.

MUNICIPAL CORPORATIONS — ORDINANCES. — City is not liable for failure to enact or to enforce proper ordinances.

Samuel Parker, for the appellant.

A. C. Capron, for the appellee.

ELLIOTT, J. The city of Plymouth had in force on the fourth day of July, 1885, and for a long time prior to that day, an ordinance prohibiting the firing of gunpowder or any other explosive substance, except in cases where the mayor on occasions of public rejoicing, granted permission to fire guns, cannon, or other things in which gunpowder could be used. On the day named, the mayor did grant permission to fire gunpowder in an anvil on a lot in the city near where there was sand, gravel, and other things of like character.

firing the anvil, pebbles and gravel were thrown against the plate-glass doors of the appellant's building, shattering and breaking them. For the loss thus caused him he brings this action. The action cannot be maintained.

A municipal corporation is not liable for a negligent failure to enforce an ordinance, nor is it liable for omitting to enact ordinances: *City of Lafayette v. Timberlake*, 88 Ind. 330, and authorities cited; *Dooley v. Town of Sullivan*, 112 Id. 451; 2 Am. St. Rep. 209; *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681.

There is no actionable breach of corporate duty in failing to enact a proper ordinance, or in failing to enforce one that has been enacted, and consequently this action cannot be maintained upon the theory that there was not a proper ordinance, nor upon the theory that the ordinance was not enforced.

The act of the mayor in granting permission to fire the anvil did not create a liability against the city. The utmost that can be granted is, that the act of the mayor constituted the wrong-doers the licensees of the corporation; and granting this, but by no means so deciding, the city is not liable for their act, because it is not shown that it was intrinsically dangerous. It is quite well settled that a municipal corporation is not liable for the acts of its licensees, unless it is shown that they were authorized to perform an act dangerous in itself: *City of Warsaw v. Dunlap*, 112 Ind. 576 (580); *Dooley v. Town of Sullivan*, *supra*; *Ryan v. Curran*, 64 Ind. 345; 31 Am. Rep. 123.

Here there is nothing to show that the authorized act was intrinsically dangerous; on the contrary, the danger arose from the negligent manner in which the licensees performed the act.

Judgment affirmed.

MUNICIPAL CORPORATION IS NOT, in the exercise of its political, discretionary, or legislative functions, answerable for the misconduct, negligence, or omissions of its agents or officers: *Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461; *Dargan v. Mayor etc.*, 31 Ala. 469; 70 Am. Dec. 505, note 511; cases cited in the opinion *supra*.

MUNICIPAL CORPORATION IS NOT LIABLE in damages for failure to perform duties of a legislative nature, nor for errors in their performance: *Stackhouse v. Lafayette*, 26 Ind. 17; 89 Am. Dec. 450, and note; *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681.

RUNYON v. SNELL.

[116 INDIANA, 164.]

HUSBAND AND WIFE — SALE OF WIFE'S LAND — PAYMENT. — Where the husband sells the wife's land under authority from her, and accepts his notes and the worthless note of a third person in part payment therefor, the acceptance of the notes instead of money cannot be regarded as payment, in the absence of evidence showing authority on the part of the husband to receive payment in such manner, or that the wife subsequently ratified his acts; and in an action by the wife to recover the price, the burden of proof is on the purchaser to show such authority in the husband or such ratification by the wife.

STATUTE OF LIMITATIONS — PAYMENT. — Where payment *sub modo* of an admitted indebtedness has in fact been made by an agent in such manner that the principal is entitled to affirm or repudiate it upon learning the facts, the statute of limitations does not begin to run until the facts are known or the payment disaffirmed.

I. F. Duckwall and George H. Koons, for the appellant.

MITCHELL, J. The plaintiff, Eliza A. Runyon, alleges in her complaint that, on the fifth day of November, 1877, she was the owner of a certain lot in the city of Muncie, in Delaware County, of the value of eleven hundred dollars, which she on that day conveyed to the defendant, Solomon R. Snell, in consideration of an agreement on the part of the latter to convey to her certain real estate which he owned in the state of Iowa. It is alleged that after receiving the conveyance of the plaintiff's real estate, the defendant refused to convey the Iowa land in compliance with his contract, to the plaintiff's damage, etc. This action was commenced in the month of October, 1884.

The defendant answered by a general denial, the six years statute of limitations, and that he had fully paid and satisfied any claim or demand for money growing out of the alleged conveyance of real estate to him.

The cause was submitted to a jury, and upon a verdict duly returned there was judgment for the defendant.

After carefully considering the evidence, we are constrained to the conclusion that the court erred in overruling the plaintiff's motion for a new trial.

There is no dispute but that the real estate conveyed to the defendant was the separate property of the plaintiff, a married woman, and it is equally beyond dispute that she has never received the value of a farthing, either in money or property, for the conveyance. Of course, if she authorized her husband to sell her property, and received payment for it, and the de-

fendant has made payment in good faith, the plaintiff cannot now complain, even though her husband may have abused her confidence and violated his obligation and duty as her agent. It must be understood, however, that the principles which govern in dealing with an agent are the same, where the agent happens to be a husband whose principal is his wife, as where the principal and agent are in other respects strangers, and that one who purchases the property of a married woman through the agency of her husband must pay for it precisely as if he had purchased through an agent who sustained no such relation. With these principles in view, we proceed briefly to consider the evidence. Accepting the defendant's testimony as true, it appears that in 1877 he held certain notes against George W. Runyon, the plaintiff's husband, amounting to about three hundred dollars. He charged Runyon with having forged the name of another as surety upon one or more of the notes, and demanded that they be taken up. Mrs. Runyon had previously authorized her husband to sell her property, and he then proposed to sell it to the defendant. The latter agreed to purchase, and pay \$550 dollars for the lot, and to turn in Runyon's notes, and another note, which the evidence tends to show was worthless, against one Glick, as part payment, and to pay the balance of the purchase price in cash. This arrangement was consummated between Runyon and the defendant.

Both Mrs. Runyon and her husband testify, and we find no evidence to the contrary, that she was induced to believe that her property was being exchanged to the defendant for land in Iowa, and the evidence makes it clear beyond doubt that she signed the deed conveying her property to the defendant under that belief.

There is no evidence which tends to show that she knew that her property had been sold, or that she authorized her husband to receive payment in the manner described. The defendant admits that she asked him again and again about the deed for the Iowa land. It may be conceded, for the purposes of this case, that Runyon had been guilty of forgery, and that he alone was instrumental in deceiving his wife, and that his motive in misleading her was to induce her to convey her property to the defendant so as to suppress any criminal prosecution which may have threatened him. The fact remains, nevertheless, that the defendant admits that he purchased Mrs. Runyon's separate property, and agreed to pay

\$550 for it, and that by an arrangement between himself and her husband he paid for it in the manner already described. In the absence of any evidence showing authority on the part of the husband to receive payment in that manner, or that the plaintiff subsequently ratified his acts, the acceptance of notes instead of money cannot be regarded as payment. When a debtor claims to have paid his debt by the delivery of property, or through any other medium than money or commercial paper, he assumes the burden of proving that what was given was received in payment.

There is no presumption that an agent, with authority to sell and accept payment for his principal, is authorized to receive in payment notes of which he is the maker, nor can he be presumed to have authority to accept the notes of third persons in payment of purchase-money due his principal: *Robinson v. Anderson*, 106 Ind. 152.

One who purchases property of an agent, and attempts to prove payment by a method so extraordinary as that claimed by the defendant, is bound to show affirmatively that the agent had authority to receive payment in the manner claimed: *Stewart v. Woodward*, 50 Vt. 78; 28 Am. Rep. 488; *Victor Sewing Machine Co. v. Heller*, 44 Wis. 265.

The defendant obtained the title to the plaintiff's property, as he asserts, through a contract made with her husband, to whom he also claims to have made payment. To the extent that he has paid for it otherwise than with money, he has made no payment at all, and the plaintiff is entitled, upon the defendant's own theory of the case, to affirm the contract and recover the unpaid purchase price.

The plea of the six years statute of limitations is not proved. The defendant having assumed to pay an admitted indebtedness to the plaintiff's agent in a particular manner, by the delivery of notes, it does not lie in his mouth to say that the plaintiff's right of action accrued until she knew, or ought to have known, the facts, and repudiated the alleged payment.

Where payment *sub modo* of an admitted indebtedness has in fact been made to an agent in such manner that the principal is entitled to affirm or repudiate it upon learning the facts, the statute does not begin to run until the facts are known or the payment disaffirmed. The legal presumption of payment growing out of the lapse of time which the statute raises is repelled by the defendant's own showing that the

payment relied on was such that the plaintiff had the right to repudiate it when the facts became known to her.

The judgment is reversed, with costs, with directions to the court below to sustain the plaintiff's motion for a new trial.

TAKING NOTE OF DEBTOR or of a third person for a pre-existing debt is not payment unless there is an express agreement to that effect: *Taylor v. Connor*, 41 Miss. 722; 97 Am. Dec. 419, and note 424; *Berry v. Griffin*, 10 Md. 27; 69 Am. Dec. 123, and note 126; *Roberts v. Fisher*, 43 N. Y. 159; 3 Am. Rep. 680; *Moses v. Trice*, 21 Gratt. 556; 8 Am. Rep. 609; *Nightingale v. Chaffee*, 11 R. I. 609; 23 Am. Rep. 531.

WHERE FRAUD OR DECEIT IS PRACTICED, the statute of limitations does not begin to run until discovery: *Munson v. Hollowell*, 26 Tex. 475; 84 Am. Dec. 582, and note 591; *Hoyle v. Jones*, 35 Ga. 40; 89 Am. Dec. 273; *Persons v. Jones*, 12 Ga. 371; 58 Am. Dec. 476; note to *Snodgrass v. Branch Bank*, 60 Am. Dec. 511-513; *Parker v. Kuhn*, 21 Neb. 413; 59 Am. Rep. 838. If at the time of the discovery of a fraud the party injured has a legal capacity to act and to contract, his right of action immediately accrues, and the statute of limitations begins to run against it, irrespective of the degree of intelligence possessed by him, or of his freedom from undue influence, or his ability to resist it: *Piper v. Hoard*, 107 N. Y. 67.

INDIANA, BLOOMINGTON, AND WESTERN RAILWAY COMPANY v. BIRD.

[116 INDIANA, 217.]

JUDGMENT BY AGREEMENT, AND AMENDMENT THEREOF AS AGAINST INNOCENT THIRD PARTY. — Where a money judgment has been entered, by agreement, for damages against a railroad company for obstructing a watercourse, but the clerk, through the plaintiff's fraudulent misrepresentations, has entered such judgment together with an agreement that the company shall erect a culvert of certain dimensions, within a certain time, at such watercourse, and the judgment, as entered, has been read in open court, and signed by the judge without objection, it will not be amended by expunging all except the money judgment, on the motion of the company, two years afterwards, and as against an innocent purchaser of the land and judgment, for value and without notice.

JUDGMENT — AMENDMENT OF, AS AGAINST INNOCENT THIRD PARTY. — Party guilty of negligence in allowing a fraudulent and erroneous judgment to be entered against him by agreement, is not entitled to an amendment of the judgment which will operate to the injury of an innocent third party who is a purchaser and assignee for value, and without notice, and where the record does not show that any fraud has been practiced.

C. W. Fairbanks, O. Gresham, E. L. Watson, and J. S. Engle,
for the appellant.

W. A. Thompson, O. A. Marsh, and J. W. Thompson, for the
appellee.

ZOLLARS, J. Our code provides that a party relieved from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect, that for any error of law appearing in the judgment, or for material new matter discovered after judgment, a party may have a review of a judgment. R. S. 1881, sec. 396, 616.

This proceeding instituted by appellant cannot be treated as an application or proceeding under either of the provisions of the code. It does not purport to be, an exercise of the inherent powers of the court for the reversal and amendment of a judgment.

The court below struck out appellant's motion as it is styled in the record, and that ruling was not an error.

The following summary of that motion or of the facts will suffice for the purposes of this decision, viz.: On the 1st of March, 1883, there was pending in the Railroad Court an action by Lindley Beard against the Indianapolis and Northern Indiana Railway Company, appellant in this action. It was charged in the complaint that he was and had been the owner of certain lands over which the railway company had laid its road; that in that construction it crossed a watercourse, and so obstructed, interfered with, and changed the course of the water as to injure the land. On the day of the trial the suit was compromised, and it was agreed that a judgment should be rendered against the railway company in favor of Beard for twenty-five dollars. It was further agreed that so soon thereafter as practicable the railway company should construct a sufficient way under the grade of its road to insure the passage of the water of the watercourse, but no agreement as to the size or dimensions of the way was entered, nor was it a part of the agreement that the judgment be entered of record as a part of the judgment. Upon the compromise being made, the court entered the following on its docket, "Withdrawn from the jury by agreement by agreement for twenty-five dollars,"—which was the only judgment agreed upon, and to be entered of record. Beard's attorneys acting for him, and with the consent of the company, represented to the clerk of the court that no agreement had been made as to the construction of the way under the road-bed, and that such agreement

tered as a part of the judgment. By means of such fraudulent representations, the clerk was induced to enter and write up as a part of the judgment, in addition to the money judgment, the following: "And the defendant shall make, at the point where the defendant's road crosses the watercourse described in the complaint on the plaintiff's land a culvert five feet wide and eight feet deep, and excavate the dirt from the bottom of the watercourse to the top of the grade, within thirty days from this date."

Acting upon the representations of Beard's attorneys, the clerk made the entry by mistake as to the real facts. The railway company had no knowledge that the judgment was thus entered until in 1885, when called upon by the appellee herein, Gideon Bird, to construct the culvert. Prior to that time, and in 1884, Lindley Beard, the owner of the land, and judgment plaintiff, had sold and assigned the judgment to Bird, and also sold and by deed conveyed the land to him.

It is also charged in the motion or complaint, that in Beard's complaint against the railway company there was no averment, prayer, or demand entitling him to any relief except a money judgment, and that there was no pleading of any kind asking for the opening of a water-way through or under the road-bed of the railway company. There is the further averment that the judgment, as entered by the clerk, was contrary to the memorandum made by the court upon its docket.

The relief asked was, that the judgment rendered in Beard's favor against the railway company might be amended, by striking out and expunging all that portion relating to the culvert or water-way; in other words, by striking out and expunging all except the money judgment.

The averments as to the judgment being contrary to the memorandum made by the judge, and as to there having been no pleadings entitling Beard to the judgment entered by the clerk, are conclusions, and not the statements of facts, and hence should be disregarded.

As to whether or not the judgment entered by the clerk was contrary to the memorandum made by the judge, is a question of law, to be determined by an inspection of that memorandum and the judgment entered. And as to whether or not the pleadings entitled Beard to the judgment entered by the clerk, is also a question of law, to be determined by an examination of that judgment and the pleadings in the cause. The

pleadings are not set out, nor is there any averment as to what they contained by way of statements of facts, or in the way of prayer for relief. In the absence of the pleadings, or averments as to their contents, it ought to be assumed that they were broad enough to authorize the relief given by the judgment, notwithstanding the allegation here of the conclusion that they were not.

It may be observed, also, that there are no averments here as to what, if any, entries there may have been made by the clerk in the issue docket, and from which he may have, in part at least, constructed the entry of the judgment: See *Chissom v. Barbour*, 100 Ind. 1.

If, however, it should be conceded that the judgment as entered was broader than the pleadings, that, of itself, would not be sufficient reason for expunging a portion of the judgment. A judgment by agreement will bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment: *Fletcher v. Holmes*, 25 Ind. 458 (463); *Hudson v. Allison*, 54 Id. 215; *Lyon v. Roy*, 54 Id. 300.

The fact, if conceded, that the pleadings may not have been broad enough in a contested case to authorize the judgment entered might be a circumstance of some weight in support of the averment that the judgment as entered was not in accordance with the agreement of the parties, but, as already stated, it would not be sufficient of itself to authorize the expunging of a part of the judgment.

We, however, place our decision upon other grounds. As above stated, the judgment in favor of Beard was rendered on the ninth day of March, 1883.

Subsequent thereto, but before this proceeding was instituted, Beard sold and conveyed the land to Bird, and sold and assigned all of his rights and interests in and to the judgment to him.

This proceeding was commenced on the sixth day of March, 1885. There was no service upon Beard, and the proceeding was prosecuted to its final decision below against Bird alone. He was an innocent purchaser for value, both of the land and the judgment. The exact date of the conveyance and assignment to him is not stated, but as it was in 1884 it must have been at least ten months subsequent to the rendition of the judgment, and may have been one year and ten months subsequent to that time. In either event, we think

that the laches on the part of the railway company, and the intervening rights of appellee, Bird, were such as to render it improper for the court to interfere by way of amending the judgment in favor of the former and against the latter. The court was asked to make the amendment, not by virtue of any statute of this state, but by virtue of its inherent authority to make the judgment as entered conform to the judgment as appellant asserts it was rendered. That the courts of this state have such authority in a proper case is well settled, but in exercising that authority they will look to the equities of the parties, and will not so exercise it as to reward the negligent, and at the same time destroy the equities of the innocent: *Ryon v. Thomas*, 104 Ind. 59, and cases there cited. See also *Chissom v. Barbour*, *supra*.

In the case before us, the railway company was in court, not only when the compromise was agreed upon and reported to the court, but as one of the parties to the compromise. Theoretically, if not in fact, it was in court when the entry of the judgment was read and signed by the judge. There is no averment in the motion or complaint here that it was not so in court. As against innocent third persons, it was its duty to be thus in court, and to see to it that the entry embodied, correctly, the judgment agreed upon. The purpose of the statute requiring judgments to be read in open court before being signed by the judge, doubtless, is to give litigants an opportunity of calling attention to any mistakes which may have been made by the clerk: See *Freeman on Judgments*, sec. 142. As against innocent third persons, a party ought to be charged with negligence who neglects to be in court when the entry of a judgment in which he is interested is read, or who being in court, neglects to call the attention of the court to clerical mistakes by the clerk in the entry of the judgment.

Appellant not only failed to apply for a correction of the judgment entry when it was read in open court, and at the term at which the judgment was rendered, but also exercised no care to ascertain what the entry was, until after appellee had parted with his money in the purchase of the land and the judgment, and not even then, for it is averred in the motion or complaint that it had no notice of what that entry was until 1885, a short time before this proceeding was commenced, when called upon by appellee to construct the water-way.

judgment where he has been guilty of gross laches: *Barber v. Rukeyser*, 39 Wis. 590; see also, as analogous, *Brumbaugh v. Stockman*, 83 Ind. 583; *Burton v. Harris*, 76 Id. 429. And especially will a party not be relieved from a judgment where he has been guilty of laches and rights of innocent third persons have intervened: See *Earle v. Earle*, 91 Ind. 27.

The law requires, as we have seen, that all entries of judgments shall be read in open court before being signed by the judge. In the absence of something positive to the contrary, it will be presumed that the law was followed in that regard in the case of Beard against the railway company. And in the absence of something positive to the contrary, it should be presumed in favor of the action of the court below that the judge who presided gave attention to the reading of the entry, and affixed his signature to the judgment which he intended should be entered, and which he had in fact rendered upon the compromise and agreement of the parties: See *Forquer v. Forquer*, 19 Ill. 68.

We have said this much in passing without undertaking to determine as to whether or not there was or is anything in the record of the case of Beard against the railway company by which the amendment of the judgment asked could properly be made, or as to whether or not the judgment as entered by the clerk is in any way in conflict with the memorandum made by the judge upon the court docket. Under the circumstances, Bird, the purchaser of the land and the judgment from Beard, was not required to look beyond the order-book where the judgment was entered and attested by the signature of the judge. So far as shown here, that entry contained nothing indicating that it was not the judgment of the court, or that it had been made in violation of any contract or compromise between the parties. As between Bird and the railway company, he had the right to rely upon the order-book entry. As between them, he must be regarded as an innocent and good-faith purchaser of the land and the judgment.

As entered, the judgment affected the land in an important particular. The embankment for the bed of the railway obstructed a natural watercourse upon the land. The judgment provided for the removal of that obstruction. Whatever may be the force and effect of that portion of the judgment, or whatever may be the proper mode of its enforcement, we know of no reason why Bird might not, in the purchase of the judgment and the land, act upon the assumption that the rail-

way company would remove the obstruction by making the water-way as in the judgment provided. And in addition, there was a judgment for twenty-five dollars, regular upon its face, entered in the proper order-book, and attested by the signature of the judge. Upon the faith of that record, Bird invested his money in the judgment and in the land. He was guilty of no negligence as against the railway company in relying upon the record. The court had complete jurisdiction. There was no fraud upon the court, nor was the railway company in any way prevented from making its defense to the action.

The record showed nothing indicating that any fraud had been practiced upon that company by Beard or his attorneys. It showed nothing to put Bird upon inquiry. The judgment had been entered, read in open court, and signed by the judge without objection from the railway company. It had been allowed to stand as a public record without objection on the part of that company, and without any effort on its part in the way of a correction. In short, as between Bird and the railway company, the latter had been guilty of negligence, and the former had not.

The party thus guilty of negligence is not in a position to ask for an amendment of the judgment which shall operate to the injury of the party who was without fault.

In the case of *Ryon v. Thomas*, *supra*, it was said: "All mistakes in a final judgment of a merely clerical character may be amended in a direct proceeding for that purpose, where the rights of some third party have not intervened in such a manner as to render an amendment inequitable."

The case of *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388, involved the right to a *nunc pro tunc* entry as against an innocent third person. The court said: "There is no doctrine resting on a mere stable ground, both of reason and authority, than that all material amendments of a record must be made with a saving of intervening rights acquired by third persons. In an order allowing an amendment, it is proper to express this by way of removing all doubt. But whether expressed or not, the law makes the reservation. For what is the judgment of a court? It does not reside, unspoken and unwritten, in the breast of the judge. It is not to be sought in the minutes or memoranda which the judge makes upon his own

to enable him to see that the clerk accurately makes up the record. These minutes, it is true, are a proper means of amending a record; but until the amendment is made, the public can act upon no other means of information than the official records of the court, as kept by an officer appointed by the law for that purpose. How often have this and other courts expressed the maxim that 'A record imports absolute verity'?"

In the case of *Church v. English*, 81 Ill. 442, one of the parties was asking for an amendment of the judgment so as to make it conform to the judge's minutes entered upon his docket. In the decision of the case the court said: "As between the original parties, we are not aware of any limitation as to the time in which such amendments may be allowed. No reason suggests itself why such amendments may not be made at any time, so long as anything definite and certain remains to amend by. But until the amendments are actually made, third persons can act upon nothing but the official record, kept by the officers appointed for that purpose, and all rights previously acquired are in no manner affected by subsequent amendments": *Cook v. Wood*, 24 Ill. 295; *M. McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 388.

This court has often stated the general rule to be, that judgment creditors are not purchasers; that their judgments are simply general liens upon whatever interest the judgment defendant may have in the land; that their rights do not stand in the way of the reformation of prior deeds and mortgages, nor in the way of the enforcement of equities as between the grantor and grantee: *Hays v. Reger*, 102 Ind. 524; *Boyd v. Anderson*, 102 Id. 217; *Foltz v. Wert*, 103 Id. 404; *Heberd v. Wine*, 105 Id. 237; *Wells v. Benton*, 108 Id. 585. In those cases many of the former decisions are cited.

It has not been decided by this court, however, that a judgment like that under consideration will be amended by erasing a portion of it as against a good-faith purchaser or assignee, where the judgment defendant has been guilty of negligence and laches. On the other hand, there are a number of cases in our reports in which it was held that a good-faith purchaser and assignee of a judgment will be protected under some circumstances, where his assignor, the judgment plaintiff, will not be. The doctrine of those cases, generally stated, received support by the opinion upon the petition for rehearing in the case of *Wells v. Benton*, *supra*.

In the case of *Boyd v. Anderson*, *supra*, it was said that in some of our cases it was held that a deed or mortgage will not be reformed as against a *bona fide* assignee of a judgment.

In the case of *Flanders v. O'Brien*, 46 Ind. 284, it was held that a mortgage upon real estate could not be corrected in the description of the land as against an innocent *bona fide* purchaser and assignee of a judgment against the mortgagor. After stating that a mistake in the description of the land intended to be mortgaged may be corrected as against a subsequent judgment plaintiff, it was further said: "The equity in favor of the mortgagee in such cases may be stronger than that in favor of the judgment plaintiff. The judgment plaintiff has not, probably, parted with his money on the faith of the apparent facts. But where the judgment has been sold and assigned to one ignorant of the mistake in the mortgage, and who has expended his money upon the faith of the rights of the parties as they appear in the respective securities, it is difficult to see any superior equity in the mortgagee. Such purchaser of the judgment has acted upon the apparent facts of the case as the parties have allowed them to exist. It is their fault if the papers do not speak the truth, and it may be unjust that their mistakes should be cured to his injury, who has been misled by their failure to attend carefully to their own business."

That ruling was approved in the case of *Busenbark v. Ramey*, 53 Ind. 499; and reasserted in the case of *Wainwright v. Flanders*, 64 Id. 306; see also *Ritter v. Cost*, 99 Id. 80 (88); *Tuttle v. Churchman*, 74 Id. 311; *Rooker v. Rooker*, 75 Id. 571; *Milner v. Hyland*, 77 Id. 458.

The cases last above noticed and cited are not in all respects like that before us, but they are somewhat analogous. The reasoning in those cases for the protection of the innocent against the negligent may be applied here for the protection of Bird, the purchaser of the land, and the purchaser and the assignee of the judgment.

The case of *Gray v. Robinson*, 90 Ind. 527, is more analogous. In that case there was a mistake in the amount of a judgment taken by agreement against the principal and sureties upon a promissory note. The amount was computed by the plaintiff. Execution was levied upon enough of the principal's property to satisfy the judgment. The sureties, to save it from sacrifice, paid the judgment, without any knowledge of the mistake, made settlement with the principal on

the basis of the judgment, taking the obligation of a third person to indemnify themselves for the sum so paid; the property was disposed of, and the principal was insolvent. Afterwards the judgment plaintiff moved for a correction of the judgment. It was held that the judgment could not be corrected as against the sureties, upon the ground that a party will not be relieved from his own mistake or carelessness, where rights have been lost or money parted with on the faith of the apparent facts.

In support of the ruling, the court cited *Flanders v. O'Brien*, *supra*, and quoted Freeman on Judgments, section 66, as follows: "The entry of judgments or decrees *nunc pro tunc* is intended to be in furtherance of justice. . . . Generally, such conditions will be imposed as may seem necessary to save the interests of third parties, who have acted *bona fide*, and without notice; but if such conditions are not expressed in the order of the court, they are, nevertheless, to be considered as made a part of it by force of the law."

And further, section 74 of the same work, as follows: "Amendments of the entries of judgments and of decrees . . . will only be permitted in furtherance of justice, and on such terms as shall protect the interests of third parties acquired for a valuable consideration without notice."

To the same effect is the case of *Urbanski v. Manns*, 87 Ind. 585. In that case, this court quoted with approval the following portion of section 66 of Freeman on Judgments: "The public are not expected nor required to search in unusual places for evidences of judgments. They are bound to take notice of the regular records, but not of the existence and signification of memoranda made by the judge, and upon which the record may happen to be afterwards perfected." See also *Wright v. Manns*, 111 Ind. 422.

Without further extending this opinion, we hold that by reason of negligence and laches on the part of the railway company, and the intervening rights and equities of Bird as an innocent purchaser of the judgment and land, the judgment should not be amended, as asked by the railway company, and that therefore the court below did not err in striking out appellant's motion or complaint.

Judgment affirmed, with costs.

AMENDMENTS OF JUDGMENTS will only be permitted in furtherance of justice, and on such terms as will protect the interests of third persons acquired for valuable consideration, without notice: Freeman on Judgments,

3d ed., sec. 74; citing *McCormack v. Wheeler*, 33 Ill. 114; 85 Am. Dec. 388; *Administrator of Ligon v. Rogers*, 12 Ga. 281; *Perdue v. Bradshaw*, 18 Id. 287. That relief will not be granted to one who has knowingly acquiesced in the entry of the judgment after he has been guilty of laches or unreasonable delay, is sustained by *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681. The sufficiency of a judgment as to matter of form cannot be questioned by a motion for a new trial, assigning as a cause that the judgment is contrary to law; nor is such a motion the proper mode by which to secure an amendment; but the remedy is by special motion for that purpose: *People's S., L., & B. Ass'n v. Spears*, 115 Ind. 297.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY v. SOLTWEDDLE.

[116 INDIANA, 287.]

EMINENT DOMAIN—REMEDY OF OWNER.—Land-owner who surrenders possession of his land to a railroad company without prepayment, and by express or implied acquiescence induces the company to expend money in constructing its road on the street in front of his land, cannot afterwards maintain ejectment and recover his land. His recovery is confined to damages and compensation on account of the location and construction of the road.

George R. Eldridge and George W. Easley, and Bayless and Russell, for the appellant.

MITCHELL, J. Soltweddle sued the railway company in ejectment to recover possession of real estate, and also to recover damages for injuries occasioned by the construction and operation of the company's railroad over the plaintiff's land. The action was commenced on the twenty-seventh day of March, 1885, and such proceedings were had as that, on the twenty-fifth day of May, 1885, judgment was rendered in the Lake circuit court in favor of the plaintiff. The court made an order directing that a writ issue to the sheriff of Lake County, commanding him to put the railway company out, and put the plaintiff into possession of the land described in the complaint. It was further ordered and adjudged that the defendant pay the plaintiff \$175 as damages.

The question is presented whether or not under the pleadings and evidence the judgment can be maintained. We are not favored with a brief or other argument on appellee's behalf. Recent decisions of this court settle the question conclusively in the negative.

It appeared in evidence that, at the time the action was

commenced, the plaintiff was the owner of lot No. 33, in one of the additions to the city of Hammond, in Lake County, and that the front of his lot abutted on Fayette Street. In December, 1883, the railroad company, whether with or without the consent of the municipal authorities does not appear, constructed its road in such a manner as that its line ran diagonally across Fayette Street, in front of the northeast corner of the plaintiff's lot.

The purpose of the action was to eject the railroad company from and to recover possession of so much of the street occupied by the company's track as lay in front of the plaintiff's lot, and to recover damages for the obstruction of the street, and for injury to the plaintiff's property occasioned by the construction and operation of the road. There was no dispute but that the road had been fully completed and put into operation more than a year before the suit was commenced.

It did not appear that the plaintiff took any steps to prevent the location or construction of the road in front of his lot, or that he was not fully apprised that it was being constructed. Having, so far as appears, stood by and acquiesced while the work of construction was in progress, and until the interest and convenience of the public became involved, he is in no position now to arrest the operation of the road by evicting the railroad company from a part of its line. The law plainly is, that a land-owner who surrenders possession of his land to a railroad company without prepayment, and by express or implied acquiescence induces the company to expend money in constructing and equipping its road, cannot afterwards maintain ejectment and recover his land.

This subject has been so fully considered in recent decisions of this court that further consideration of it here is unnecessary: *Midland R'y Co. v. Smith*, 113 Ind. 233; *Cincinnati etc. R. R. Co. v. Clifford*, 113 Id. 460; *Indiana etc. R'y Co. v. Allen*, 113 Id. 581; *Evansville etc. R. R. Co. v. Nye*, 113 Id. 223; *Bravard v. Cincinnati etc. R. R. Co.*, 115 Id. 1; *Sherlock v. Louisville etc. R'y Co.*, 115 Id. 22.

The foregoing authorities make it clear that the plaintiff is now confined to the recovery, by the appropriate method, of such compensation and damages as he may be entitled to on account of the location and construction of the road.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

OWNER OF LAND TAKEN FOR RAILROAD cannot maintain ejectment therefor after the road is constructed and put in operation if he has acquiesced in the occupation of the land for that purpose without prepayment of his damages under an agreement for future payment: *McAulay v. Western Vermont R. R.*, 33 Vt. 311; 78 Am. Dec. 627. But he may maintain ejectment where he has not been offered compensation: *Terre Haute etc. R. R. Co. v. Rodel*, 87 Ind. 128; 46 Am. Rep. 164. Or he may maintain an action for compensation: *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109; 5 Am. St. Rep. 337. The legislature has power to provide that the tacit acquiescence of the parties interested in a street improvement, and their failure to challenge the proceedings while in progress, will estop them from questioning the regularity thereof after they are completed: *Lent v. Tillson*, 72 Cal. 404.

FITZMAURICE v. MOSIER.

[116 INDIANA, 363.]

CANCELLATION OF INSTRUMENTS VOID AT LAW — PROMISSORY NOTE. — The cancellation of a promissory note of the plaintiff in the hands of the defendant, and shown to be without validity, and to have been wrongfully procured, will be decreed by a court of equity, although the plaintiff had a complete remedy at law against the collection of the note.

EQUITABLE JURISDICTION — CANCELLATION. — To exclude the equitable jurisdiction, the legal remedy must be, in all respects, as satisfactory as the relief furnished by a court of equity.

W. A. Thompson, A. O. Marsh, and J. W. Thompson, for the appellant.

A. J. Stakebaks, for the appellee.

NIBLACK, J. Complaint by Christian Mosier against William Fitzmaurice, in two paragraphs. The first paragraph averred that the plaintiff, on the third day of January, 1882, executed to the defendant his promissory note for the sum of \$34.86, payable fifteen days after date, without relief from valuation laws; that the plaintiff afterwards, and during the year 1882, fully paid the debt of which such note afforded the evidence, but that the note was not delivered up to the plaintiff at the time it was paid; that the plaintiff had, divers times since the note was so paid, demanded of the defendant that it be surrendered for cancellation, but that the defendant had refused to so surrender the note, of which he was still in the possession, and which he still claimed to own.

The second paragraph alleged that, on the third day of January, 1882, the defendant made out an itemized account against one Christian Mosier and brother, for the sum of \$34.86, and placed the same in the hands of one Lewis, an

attorney at law, for collection; that the plaintiff was not the Christian Mosier named in said account, nor was he in any way liable to pay such account, or the debt represented by it; that the plaintiff was, at the same time, indebted to the defendant in an account, but in another and a different one from that left in the hands of Lewis for collection as above stated; that the said Lewis, who was the attorney for the defendant, and who acted for him and at his instance, represented to the plaintiff that he had his, the plaintiff's, account also in his hands for collection or settlement; that the plaintiff, relying on said representation, and believing the same to be true, and that he was settling his own account, executed to the defendant, and delivered to the said Lewis, the promissory note described in the first paragraph hereof; that said note was, in the manner stated, executed by mistake, and without any consideration whatever; that it was not given for the benefit of the said Christian Mosier and brother, nor to secure the debt owed by them; that the defendant was then the holder and in the possession of said note, claiming to be the owner thereof; that the plaintiff had frequently demanded the surrender and cancellation of said note, but that defendant had refused to surrender the same and to permit the cancellation thereof; that the defendant had threatened to negotiate the note to innocent parties, and to cause suit to be instituted thereon. Wherefore the plaintiff prayed that the note might be required to be surrendered and canceled, and that the defendant might be perpetually enjoined from either negotiating or instituting suit upon said note.

Separate demurrers were overruled to both paragraphs of the complaint, and after issue joined and a hearing, the circuit court made a finding for the plaintiff, and decreed accordingly. Error is assigned upon the overruling of the demurrers to both paragraphs of the complaint.

It is claimed that, upon facts stated in the first paragraph of the complaint, Mosier had a complete defense at law against the note alleged to have been paid, and that consequently the refusal of Fitzmaurice to surrender the note afforded no ground for the equitable relief demanded, and authorities are cited in support of the doctrine thus contended for.

The American doctrine on the subject of equitable jurisdiction restricts courts of equity, as a general rule, to narrower limits than does the English doctrine on that subject. This


has resulted partly from the tendency of legislation in that direction, and partly from the construction given to our constitutional guaranties relating to the right of trial by jury. With us the generally accepted doctrine is, that the exercise of jurisdiction to grant equitable relief, such as cancellation of instruments, is not to be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case, where a legal remedy, either affirmative or defensive, which the injured or defrauded party might obtain, would be adequate, certain, and complete.

It is not enough, however, that there is a legal remedy to exclude the equitable jurisdiction, the legal remedy must meet all the requirements of justice, and be, in all respects, as satisfactory as the relief furnished by a court of equity. Latterly the tendency has been towards a relaxation of the American doctrine as stated, and particularly so in the states which have adopted codes of civil procedure, sometimes designated the code states.

In Pomeroy's Equity Jurisprudence, one of our most modern as well as most approved works on the subject to which it relates, it is said, at section 1377, that "a doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and canceled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference; but it is now well settled that jurisdiction will be exercised in such cases, except where the invalidity of the instrument is apparent on its face: See also Pomeroy's Jur., secs. 297, 914.

Our cases are in entire accord with the modern rule announced by Pomeroy, and some of them have, perhaps, been advanced upon it to some extent in its application to certain classes of instruments, which, though void on their face, constitute nevertheless a cause of irritation, annoyance, or harassment so long as they are permitted to remain in the hands of the adverse party.

In the recent case of *Otis v. Gregory*, 111 Ind. 504, the court said: "Whatever may have been formerly held in the various jurisdictions in respect to the cancellation of void contracts, the doctrine that a party to an instrument which is void at law has no legal force or validity whatever may ask the aid of a court of equity in procuring its surrender and cancellation is now



set at rest here. It is regarded as against conscience that one party should persist in holding a deed or other instrument against another of which he can make no possible use except as a means of embarrassing his adversary." This statement as to the limit to which equitable jurisdiction extends in this state is, as we believe, well supported by the weight of modern authority, and rests upon sound principles of remedial justice. On the same general subject, see also the cases of *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731, and *Scobey v. Walker*, 114 Ind. 254.

According to the averments of the paragraph of complaint under consideration, Mosier had fully paid the note therein described, but Fitzmaurice had, upon demand, refused to surrender it for cancellation, and continued in possession of the note, claiming still to own it. This condition of affairs constituted an element of disturbance between the parties, and a standing menace as well as cause of embarrassment to Mosier entitling him to immediate equitable relief. To have required Mosier, under such circumstances, to await the pleasure of Fitzmaurice, or his executor, administrator, or assignee, in bringing suit on the note, might have resulted injuriously to his interests. The lapse of time often makes it more difficult to prove an affirmative defense.

Courts of equity have in an especial manner jurisdiction of all matters involving fraud, mistake, or accident. The second paragraph of the complaint before us sought relief from the consequences of a mistake made in the execution of a promissory note, and made what appears to us to have been a good *prima facie* case in that respect.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

ELLIOTT, J. There is much reason for extending the equity powers of the court, where, as with us, there are no separate tribunals, but the rules of law and equity are administered by the same court. There is no good reason why a court should not exercise its equity power to direct the cancellation of a promissory note that justice requires should not be enforced. We can perceive no reason why a court may not decree the cancellation of a note which is shown to be entirely without validity and to have been wrongfully procured. We think the second paragraph of the complaint states a case in which justice will be subserved by decreeing the cancellation of the

promissory note of the plaintiff in the hands of the defendant. That paragraph shows that the note in question was executed by the plaintiff in the belief that it was in payment of a debt due the defendant, that this belief was created by the representations of the latter, and that the representations were untrue, inasmuch as the debt was not that of the plaintiff, but of a different person. By means of the untruthful representations, the defendant secured the promissory note of the plaintiff for an entirely different purpose from that for which he intended to execute it, and for which he believed he was executing it. We cannot agree with appellant's counsel that the pleading simply shows a case of failure of consideration or of payment; on the contrary, we are satisfied that it shows (not as definitely and clearly as it might be desired, it must be said) that by false representations the defendant induced the plaintiff to execute a promissory note for a purpose entirely different from that for which he believed he was executing it. If, however, we take the more favorable view to the appellant, and hold that the note was executed by mistake, we must decide the case against him, for even on this theory we should be compelled to hold that there was a material mistake of fact brought about by the false statements of the appellant, and that a note executed because of such a mistake cannot be enforced: *Parrish v. Thurston*, 87 Ind. 437.

Where the defendant knows that the plaintiff believes he is contracting about a different subject from that actually dealt with, it is a fraud on the defendant's part to remain silent and reap an advantage from the silence. Of course, if the defendant has no knowledge of the belief of the plaintiff, it is otherwise; here, however, the defendant not only knew of the plaintiff's belief, but he, by positive statements, created that belief.

The pleading is a clumsy one, and it is not without hesitation that we give it the construction we have done. We think, however, that as it shows that the defendant's agent, who conducted the transaction, had not in his hands, as represented, the bill against the appellee, and for which, relying on the agent's representations, the note was executed, it is justly inferable that the note was executed for a debt different from that for which the appellee intended to execute it, and for which he believed he was executing it.

Petition overruled.

CANCELLATION OF INSTRUMENTS IN EQUITY NOTWITHSTANDING A DEFENSE AT LAW. — No doubt exists that if when a suit is brought in equity to cancel a writing, it is shown that the complainant has a complete, adequate, and perfect remedy at law, the court will not entertain jurisdiction, but will leave the party to enforce his common-law remedy. However, in those cases where a remedy at law exists, but is not adequate, equity will entertain jurisdiction. On this question the court, in *Springport v. Teutonic Savings Bank*, 75 N. Y. 397-402, per Rapallo, J., said: "In cases of this description, the propriety of affording equitable relief to a party against a prosecution at law, or decreeing the cancellation of instruments, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case, and it is impossible to lay down general rules which will govern in all cases. Some rules have been evolved from the cases which have arisen, and among these none is more fully established than that equity will not interfere in the case of an instrument invalid on its face, nor where its invalidity will appear upon the proofs of the party claiming under it, even where it affects the title to land." This was an action to enjoin the holders of bonds from transferring them, and to compel them to deliver them up to be canceled. The court held that, while the existence of a defense, the risk of losing evidence, or the apprehension of a multiplicity of suits, may not either of them separately be a sufficient ground for restraining suits at law upon or decreeing the cancellation of instruments, especially where proof of extrinsic facts is not necessary to establish the defense, yet when all these elements are combined, and extrinsic proof is necessary to establish the defense, a proper case for equitable relief is established. In another case it is said that an action to procure the cancellation of a written instrument cannot be maintained unless some special circumstances exist establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert: *Globe Mut. L. Ins. Co. v. Reals*, 79 N. Y. 202, an action to procure the cancellation of a life insurance policy alleged to have been procured by fraud. In *McHenry v. Hazard*, 45 Id. 580, it is said that the power of a court of equity to compel the surrender and cancellation of deeds and other written instruments obtained by fraud or held for inequitable purposes is undoubted, but the exercise of such jurisdiction is in the sound discretion of the court, depending in each case upon the existence of special circumstances, and it is not material, upon the ground of jurisdiction, that the party seeking relief has a defense at law to the instrument of which he prays cancellation.

The power of a court of equity, says Van Fleet, vice-chancellor, in *Smith v. Smith*, 30 N. J. Eq. 564-567, "to decree the surrender of an invalid or worthless bond, or other instrument, even though a complete defense at law exists, cannot be questioned at this day. If a suit at law has already been brought, this court will not arbitrarily or causelessly change the forum of litigation; but if adequate relief cannot be given at law, or if the defense is of a character that cannot be urged at law without embarrassment and hazard, the court will take jurisdiction, and give suitable relief." "The weight of modern authority supports the jurisdiction in equity of suits for the cancellation of written instruments obtained by fraud. It is exercised for the purpose of affording relief against invalid executory contracts in the possession of another, where the invalidity is not apparent on the instrument itself, and where the defense at law may be nullified by intentional delay to sue until the evidence in support of it is lost": *Fuller v. Percival*, 126 Mass. 381. In *Hamilton v. Cummings*, 1 Johns. Ch. 517, Chancellor

is or is not void at law, and whether it is void upon its face or for matter appearing from proof taken in the case; and that the cases can all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion as the peculiar circumstances of each case may dictate, and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense not arising on its face may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper, and clear of all design to promote litigation and expense. In *Metter v. Metter*, 18 N. J. Eq. 377, an action was brought to compel the cancellation of a note, and the court said: "The note, being without consideration, is void, and cannot be recovered upon at law; and it is contended that, as the complainants have a complete defense at law, they cannot resort to equity. Such, no doubt, is the general rule, and were the present suit at law the only matter to be relieved against, it might decide this case. But here is a note not void on its face, which in case of a discontinuance or nonsuit might be held until the evidence of its being without consideration could not be had, and then a suit brought on it by these parties. In such case the jurisdiction of courts of equity to order the security to be given up to be canceled is now well established. There has been some diversity of opinion and decision on this point, and more in cases where the instrument asked to be canceled is at law void upon its face, but even then the weight of authority is in favor of it. In cases where the instrument is on its face valid, and especially if negotiable, the jurisdiction of the court is founded upon principle adopted among other cases in bills *quia timet*." In *Ferguson v. Fisk*, 28 Conn. 501, a draft had been indorsed specially by the original payee and by later indorsements, but had never been indorsed in blank. The holder erased all the later and the special part of the first indorsement, and brought suit upon the draft in his own name. The acceptor then brought suit for a cancellation of the draft, and it was held that though he might have a good defense to the action at law by the holder, still he was entitled to relief by cancellation, since he might be harassed by other suits upon the draft. So an action is maintainable for cancellation of a cloud on a title, consisting of a forged deed, which, upon the strength of a false certificate of acknowledgment, made by a duly authorized officer, has been put upon record; for where the law raises a presumption of the validity of an instrument, and its invalidity can only be shown by extrinsic proof, an action to compel a cancellation can be maintained: *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

DURHAM v. SHANNON.

[116 INDIANA, 402.]

WITNESS. — RIGHT TO TESTIFY REGARDING MATTERS OCCURRING DURING THE LIFETIME OF A DECEDENT, although in certain cases prohibited by statute where an executor or administrator is a party, is yet allowed in a replevin suit against a purchaser from the administrator at public sale.

EVIDENCE. — DECLARATIONS BY DECEDENT, TWO DAYS BEFORE HIS PURCHASE OF A HORSE, that he intended purchasing a colt for plaintiff,

admitted as substantially coincident with the act of purchasing, and declarations by decedent after the purchase, and while still in possession of the horse, and in disparagement of his title, are receivable as part of the *res gestæ*.

S. B. Davis, S. C. Davis, R. B. Stimson, and S. C. Stimson, for the appellant.

J. E. Lamb, G. W. Faris, and S. R. Hamill, for the appellee.

MITCHELL, J. Replevin by Shannon to recover the possession of a mare and colt, of which he alleges he is the owner, and which, it is charged, the defendant, Durham, unlawfully took and detained, etc.

Upon an issue made by the general denial, there was a trial resulting in a verdict and judgment for the plaintiff.

It appeared that Patrick Shannon, since deceased, purchased the mare at a public sale in 1877. The plaintiff, although not related by blood, had been in some sense a member of Shannon's family from his early childhood, and claimed that the latter had presented him the mare, on the day he purchased her, as a gift. The animal remained in the possession of Shannon, who used her apparently as his own, until the fall of 1885, when he sent her to Lexington, Kentucky, to be bred. She remained there until after Shannon died, which occurred in April, 1886, and until after she had the colt in controversy. Subsequently, the administrator of the decedent's estate paid the bills incurred in Kentucky, and while the mare and colt remained in that state they were sold by order of the court by the administrator to the defendant, Durham, for five hundred dollars, who brought them to Indiana at his own expense, in March, 1887. The plaintiff commenced this suit in May following.

At the trial, the plaintiff produced witnesses who gave evidence of declarations made by Patrick Shannon in his lifetime, tending to show that he had given the animal to the plaintiff; and the latter was also permitted to testify in his own behalf, to the effect that the decedent had presented the mare to him on the day she was purchased and brought to the Shannon homestead.

On the appellant's behalf, it is now contended that the plaintiff was incompetent to testify concerning the alleged gift of the mare to him by the decedent in his lifetime, within the prohibition contained in section 498 of the Revised Statutes of 1881.

This section enacts that "in suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate."

In determining the competency of a witness, the accepted rule is not to regard the mere letter of the statute, but to look to its spirit and purpose: *Clift v. Shockley*, 77 Ind. 297; *Wiseman v. Wiseman*, 78 Id. 112; 38 Am. Rep. 115; *Ketcham v. Hill*, 42 Ind. 64; *Peacock v. Albin*, 39 Id. 25.

The evident purpose of the section under consideration was to protect the estates of deceased persons from the apprehended danger of permitting the surviving party to a contract or transaction to testify in respect to it, after the lips of the other party had been closed by death. Hence a party to a transaction involved in the issue on trial is put under a statutory disability, and is excluded from testifying when the other party to the same matter is disabled by death, and where he is represented in the action which involves such contract or transaction by an executor or administrator, or some one who, in legal contemplation, stands in his place, and when the judgment to be rendered may affect his estate either directly or indirectly.

Accordingly it was held in *Taylor v. Duesterberg*, 109 Ind. 165, that where a party to a contract or transaction is dead, and his rights in the contract or subject-matter have passed to another, who represents him in the action or proceeding, the true spirit and purpose of the act excludes the surviving party to the transaction from testifying in relation to matters pertaining thereto which occurred during the lifetime of the decedent. Generally speaking, three things must concur in order to exclude the testimony of the surviving adversely interested party: 1. The transaction, or the subject-matter thereof, must be in some way directly involved in the action or proceeding, and it must appear that one of the parties to the transaction about to be proved is dead. 2. The right of the deceased party must have passed, either by his own act or that of the law, to another, who represents him in the action or proceeding in the character of executor, administrator, or in some other manner in which he is authorized by law to bind the estate. 3. It must appear that the allowance to be made,

or the judgment to be rendered, may either directly or indirectly affect the estate of the decedent.

In the case last above cited, both parties to the transaction concerning which the parties thereto were called to testify were alive. The decedent was not a party to the matter about which testimony was offered, and had no interest in the transaction when it occurred, and although he was represented by an administrator and his estate was interested in the subject-matter of the transaction, and was liable to be affected by the judgment to be rendered, it was nevertheless ruled that since the transaction only came collaterally in question, and the decedent was not a party to it, the parties were competent to testify.

Clift v. Shockley, 77 Ind. 297, is a representative case showing the proper construction of the statute when considered from another point of view. In that case an administrator had paid a claim against the estate of the decedent with the order of the court. Exceptions were taken to his account and the propriety of his conduct in making payment of the claim came in question. He called the person whose claim he had paid as a witness to prove that it was just, and that it was properly paid. It was held, although the witness was not a party to the proceeding, and had no interest in the event of the suit, that since the purpose of the statute was to guard against fraud, and since the testimony offered was liable to affect the estate injuriously, the witness was properly excluded from testifying.

The cause of action in the present case is the wrongful taking and unlawful detention of the property described in the complaint. The parties to this cause of action are both living. The transaction between the plaintiff and Patrick Shannon arises incidentally only, and is collateral to the real cause of action.

Neither of the parties to the action in any sense represents the estate of Patrick Shannon, nor will the judgment bind or conclude the estate. True, the plaintiff predicates his title to the property in dispute upon the gift alleged to have been made to him by the decedent, and if the estate of the decedent was in any way represented in the action, or interested in the controversy, so as to be concluded by the judgment, the purpose of the statute would exclude the plaintiff's testimony. But this is not the fact, and the case is therefore neither w

the reason nor the letter of the statute: *Downs v. Belden*, 46 Vt. 674; *Bradley v. West*, 68 Mo. 69.

If the administrator can be required to reimburse the purchaser, a subject concerning which we intimate no opinion, he may maintain replevin for the property without being in any way embarrassed by the judgment rendered in this action, in which the estate was in no way represented.

The court admitted in evidence declarations made by Patrick Shannon a day or two before he purchased the mare in controversy, to the effect that he intended to purchase a colt for the plaintiff, and also declarations made after the purchase, and while the animal was ostensibly in his possession, to the effect that he had purchased her for the plaintiff.

These declarations were properly admitted; the first as being substantially contemporaneous with the act of purchasing, and while it was in progress, and where one is competent, the contemporaneous declarations are also admissible as part of the *res gestæ*. The last were admissible under the rule which declares that the declarations of a person, while in possession of personal property, in disparagement of his own title or explanatory of the character of his possession, are always received as part of the *res gestæ*: *Creighton v. Hoppis*, 99 Ind. 369, and cases cited.

It is quite true that declarations made by a person under whom a party claims, after the declarant has parted with his right, are not admissible to affect the title of another person claiming from the same source. But as possession of personal property is the *indicia* of ownership, declarations made by a person while in possession, in derogation of his ownership, are admissible, not only as against the declarant, but as against one claiming to have derived a title under him subsequent to such declarations.

The rule of law is, that where it becomes important to inquire into the nature of an act, or the character of possession of property, proof of what the person said while performing the act, or while the possession continued, is admissible in evidence.

An examination of the instructions, about which some complaint of a general character is made, leads us to the conclusion that they are not justly subject to adverse criticism. The evidence, if believed, was, of course, sufficient to sustain the verdict. We find no error.

The judgment is therefore affirmed, with costs.

DECLARATIONS NEED NOT TAKE PLACE immediately with occurrence main act: *McDowell v. Goldsmith*, 6 Md. 319; 61 Am. Dec. 305.

DECLARATIONS OF PARTY IN POSSESSION of property as to ownership admissible in evidence as part of the *res gestæ*: *Nelson v. Iverson*, 24 Ala 60 Am. Dec. 442, note 449.

DECLARATIONS OF PARTY IN POSSESSION ADVERSE TO HIS OWN INTEREST are admissible against all persons claiming under him: *Currier v. Gale*, Gray, 504; 77 Am. Dec. 343.

ADMISSIBILITY OF DECLARATIONS AS PART OF RES GESTÆ is fully discussed in the note to *People v. Vernon*, 95 Am. Dec. 51-76; *Pilkinton v. Railway* (70 Tex. 226; *T. & N. O. R'y v. Crowder*, 70 Id. 222.

DECLARATIONS OF ONE IN POSSESSION ARE ADMISSIBLE to prove how he holds, whether as tenant or as proprietor, but not to establish a parol lease or to prove its terms: *Garber v. Doerson*, 117 Pa. St. 162.

EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY v. CRIST.

[116 INDIANA. 446.]

NEGLIGENCE — PLEADING. — IN AN ACTION FOR DAMAGES AGAINST A RAILROAD COMPANY FOR INJURIES SUSTAINED BY A PARTY LAWFULLY USING A PUBLIC HIGHWAY, which the railroad company had unlawfully and negligently left in an unsafe condition, a general averment that there was no fault or negligence on the part of the plaintiff makes the complaint good upon the question of contributory negligence, unless facts specifically pleaded clearly show that the plaintiff was negligent. A PERSON IS NOT COMPELLED TO EXERCISE MORE THAN ORDINARY CARE WHEN RIDING UPON A HIGHWAY which served as the only way of ingress and egress from her home, and which had been unlawfully and negligently left in an unsafe condition by the company against which the action was brought.

HIGHWAY — RESTORING TO FORMER CONDITION. — THE RIGHT OF A RAILROAD COMPANY TO INTERFERE WITH A HIGHWAY is coupled with a duty to make it as safe as it was before it was disturbed, or at least use reasonable care and skill to do so. Any one unlawfully interfering with a highway creates a nuisance, and is liable in damages to one who suffers a special injury.

EVIDENCE. — AN OPINION AS TO RATE OF SPEED AT WHICH A HAND-CAR WAS MOVING on a specified occasion may be given in evidence by a man who has managed hand-cars or assisted in managing them.

EVIDENCE. — UNDER PROPER ALLEGATIONS IN THE COMPLAINT, a plaintiff may prove the nature and extent of injuries received.

EVIDENCE. — A PHYSICIAN, SPEAKING AS AN EXPERT, may testify as to the effect of an injury.

PRACTICE. — INSTRUCTIONS MAY BE REFUSED AFTER THE ARGUMENT HAS BEEN BEGUN.

J. E. Iglehart and E. Taylor, for the appellant.

W. C. Hultz, O. B. Harris, and J. S. Bays, for the appellee.

2220-1, 2. The complaint of the appellee is in three paragraphs; each avers that the injury for which a recovery is sought was caused by the negligence of the defendant, and that the plaintiff was injured without any fault or negligence on her part. They each contained these allegations: That the appellee lived with her father, who owned land not far from the appellant's railroad; that the only means of egress and ingress was a public highway; that the defendant constructed and built the last-described line of railroad across, upon, and along said last-described highway, for a distance of three quarters of a mile west from the eastern terminus of said last-described highway, and unlawfully, carelessly, and negligently failed to construct its line of railroad so as not to interfere with the free use of said highway, and so as to afford security for life and property, in this, that the defendant dug an excavation some six feet deep and fifteen feet wide in the highway for a distance of 150 yards, and piled the dirt from said excavation along the sides thereof, making embankments some nine feet high for the distance of 150 yards, leaving no way for persons to pass along the highway except upon the embankment, with the railroad track between; and that the defendant unlawfully, carelessly, and negligently failed, and still fails in every particular, to restore the highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises.

The second and third paragraphs each contain these allegations upon the subject of the defendant's negligence:—

“That, on the eighth day of October, 1886, this plaintiff was lawfully riding her horse upon the highway, so impaired, eastward to her home; that while she was so riding along it between her home and the western highway running north and south, the defendant's agents approached along said railroad from the east in a hand-car and frightened plaintiff's horse, and, knowing the situation of plaintiff, but disregarding their duty, they negligently managed the hand-car, in this, that, after seeing the dangerous situation in which plaintiff was placed, they failed to stop said hand-car, and thereby prevent plaintiff's horse from becoming frightened, and thus prevent plaintiff from being injured; that on account of such negligence and the negligence of defendant in failing to restore the highway to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its fran-

chises, this plaintiff, without any fault or negligence on her part, was greatly injured."

The first paragraph does not contain the allegations last quoted, but does contain, in addition to those already mentioned, the following averments: That, on account of the defendant's negligence in failing to restore the highway, the plaintiff, "while riding her horse eastward, to her home, upon the highway so impaired, on the eighth day of October, 1886, without any fault or negligence on her part, was thrown from her horse" and injured.

The question whether the complaint shows that there was not contributory negligence on the part of the appellee, cannot be decided without first ascertaining and determining what duty the appellant owed the public respecting the highway which it had changed from its former condition; for it is important to give due prominence to two essential facts: one is, that the plaintiff was in lawful use of a public highway, and the other is, that, for its own benefit, the appellant had changed the highway, and negligently failed to restore it to its former condition, thus making its use unsafe and dangerous. Nor can this question be disposed of without giving just effect to the general averment that there was no fault or negligence on the part of the plaintiff. This averment makes the complaint good upon the question of contributory negligence, unless the facts specifically pleaded clearly show that the plaintiff was negligent. We concur with appellant's counsel that, ordinarily, the specific facts will control the general averment, if they make it clear that there was contributory negligence: *Reynolds v. Copeland*, 71 Ind. 422.

It has, however, long been the rule in this court, that unless the facts specifically stated clearly show that there was contributory negligence, the general averment will rescue the complaint from its assailant.

In the case of *Town of Salem v. Goller*, 76 Ind. 291, it was said: "The allegation that he was without fault, like the general averment of negligence, has a technical significance, and admits proof of any facts tending to show its truth.

The cases are collected in *Ohio etc. R'y Co. v. Walker*, 113 Ind. 196, 3 Am. St. Rep. 638, and it was said: "The rule that the general averment is sufficient has been so long established and so often approved that we should feel bound to adhere to it even if we doubted its soundness; but we think its soundness can be vindicated on principle. It is in the nature of a nega-

tive fact, and an averment of such a fact cannot be made with the same particularity as an affirmative one. The elementary books, recognizing this, agree that in such case a general averment is ordinarily sufficient. It is evident that any other rule would be practically incapable of enforcement, for a negative fact can seldom be alleged except generally and by way of denial, since any other course would require a process of exclusion and elimination that would lead to an almost endless pleading. If the specific facts absolving the plaintiff from fault must be pleaded, then it would be necessary to enumerate every fact that might be considered as tending to charge him with fault, and negative its existence. In some cases this process of enumeration and exclusion would be practically impossible; in others, it would lead to a prolixity of pleading that would do no good, but would produce uncertainty and confusion."

The question now in hand comes to us, not as one of evidence, but as one of pleading, and therefore as one to be determined under the rule stated. For this reason the cases cited by the appellant which bear upon questions arising on the evidence and on the instructions are not relevant.

Testing the complaint by the settled rule, it must be held to show that the plaintiff was not guilty of contributory negligence, since the specific facts do not clearly negative the general averment. They do not, in truth, negative it in any respect, but, on the contrary, are consistent with it.

The two important facts to which we have referred, — the place where the injury was received and the duty of the appellant respecting the highway it had made unsafe, — when assigned their due weight, fully and clearly relieve the plaintiff from any imputation of negligence; especially is this so when the facts are considered, as they must be, in connection with the explicit averment of her complaint that she was without fault or negligence.

She was upon a public highway leading from her home, and there she had a right to be. She was, it is true, bound to exercise ordinary care in using the highway, but she was not bound to do more. She was not crossing a railroad track, where the rights and duties of the company and a traveler are reciprocal, but she was upon a public way, which the company had no right to use in operating its road, or to make unsafe.

The action is not, it is to be remembered, to recover for

injuries received on a crossing, for the complaint proceeds upon a radically different theory. The cases of *Indiana etc. R'y Co. v. Greene*, 106 Ind. 279, *Indiana etc. R'y Co. v. Hammock*, 113 Id. 1, and *Cincinnati etc. R. R. Co. v. Butler*, 103 Id. 31, are not in point, for the reason that they were cases where the injury was received on a crossing, and not cases where the interference with a public highway and a negligent breach of duty caused the injury. Throughout this case this difference runs, exerting all through it a controlling influence. Here the defendant negligently failed to perform a duty imperatively enjoined upon it by positive law.

When we come to consider the question of the appellant's negligence, as we shall presently do, we shall state the nature and extent of that duty; but at this point we need only declare that the complaint avers, and the demurrer confesses, that a statutory duty respecting a public highway was violated, and that this wrong, concurring with another wrong, caused the plaintiff's injury. We do not of course decide that the negligent breach of a statutory duty not constituting a willful tort would make the defendant liable if the plaintiff's negligence contributed to the injury for which she seeks a recovery; but what we do decide is, that the character of the duty, and the nature of the place where the injury was received, are important factors in the solution of the legal problem.

If it were granted that the plaintiff had knowledge that she would be exposed to some danger in attempting to ride along the highway made unsafe by the defendant's wrong, that fact of itself would not in such a case as this necessarily preclude a recovery. Knowledge is not always a bar to a recovery. It is not a bar in such a case as the present, for the plaintiff was not bound to refrain entirely from using the only highway which gave her access to her home or led from it. We have many decisions upon this general subject. In one of them it was said:—

“The appellant, though he saw the engine, was not bound to anticipate all the perils to which he might be exposed in driving past it, or to refrain absolutely from pursuing his usual course on account of unseen and unknown, though probable, risks. Some risks, such as arise from obstructions in highways, are taken constantly by the most prudent of men, and where, as in this case, the party pursues the usual course, believing it to be safe, he is not guilty of contributory

negligence. It was a question for the jury, and by their general verdict they have found upon this point in favor of the appellant, and with it this special finding is not irreconcilable, or necessarily inconsistent": *Turner v. Buchanan*, 82 Ind. 147; 42 Am. Rep. 485.

A later case contains this statement of the rule: "It is to be determined from the facts of the case whether the known danger is likely to subject the plaintiff to injury, and if it is, then he must be held guilty of negligence in encountering it. While, therefore, it cannot be held that one who does not go out of his way to avoid known danger is not always guilty of contributory negligence, yet it must be held that he is guilty of negligence where he attempts to pass the danger where there is such a probability of injury as would deter a reasonable man from assuming the risk of passing it. If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will preclude a recovery": *Lake Shore etc. R'y Co. v. Pinchin*, 112 Ind. 592.

The principle we assert was applied in a case in all its characteristic features the same as the present; we refer to the case of *Evansville etc. R. R. Co. v. Carvener*, 113 Ind. 51. There are numerous other cases in our reports asserting this general doctrine. Among them are *City of Huntington v. Breen*, 77 Id. 29; *Wilson v. Trafalgar etc. G. R. Co.*, 83 Id. 326; *Henry County T. P. Co. v. Jackson*, 86 Id. 111; 44 Am. Rep. 274; *Nave v. Flack*, 90 Ind. 205; 46 Am. Rep. 205; *City of Indianapolis v. Murphy*, 91 Ind. 382; and *Louisville etc. R'y Co. v. Phillips*, 112 Id. 59; 2 Am. St. Rep. 155.

In a recent edition of a work of excellent standing it is said: "The fact of using a highway after obtaining such knowledge does not necessarily and conclusively establish negligence contributing to an injury resulting from a defect therein": 1 *Shearman and Redfield on Negligence*, 4th ed., sec. 101.

In another work it is said, "And an exposure to known danger [is] not always negligence": 4 *Am. & Eng. Cyclo. of Law*, 36.

Very many authorities are cited in support of this proposition. To the authorities there collected may be added the later cases of *Pennsylvania etc. Co. v. Varnau*, Penn. Sup. Ct., October, 1888; *Gulf etc. R'y Co. v. Gasscamp*, 69 Tex. 545; and *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159.

But while it is true that knowledge of danger does not necessarily defeat a recovery, yet in all cases it is an important factor, and in many the character of the knowledge and the nature of the danger may be such as to constitute contributory negligence. If the danger is so near and so great that a prudent man knowing of its existence would not assume the hazard of encountering it, then it does constitute such contributory negligence as will defeat a recovery: *Town of Gosport v. Evans*, 112 Ind. 133; 2 Am. St. Rep. 164; *Lake Shore etc. R'y Co. v. Pinchin*, *supra*; *City of Richmond v. Mulholland*, 116 Ind. 173; *Eckerd v. Chicago etc. R'y Co.*, 70 Iowa, 353; *Fulliam v. City of Muscatine*, 70 Id. 436.

It is quite clear that it cannot be said in this case that the danger was one which the plaintiff was bound to shun, or assume at her own peril all the risk attending the attempt to pass it. The case is not one of a plaintiff casting himself upon a known danger which a prudent person would not have encountered.

We come now to the question which, as we have seen, is intimately blended with the one we have already discussed, and that is the negligence of the defendant.

The initial step in the defendant's wrong was the negligent violation of a mandatory statute. Section 3903 of the Revised Statute of 1881 provides for the construction of railroads, and in prescribing the duties and rights of a railroad company, declares that it shall have the right "to construct its road upon or across any stream of water, watercourse, road, highway, railroad, or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

This statute prescribes a plain duty. Indeed, the duty existed independent of the statute, but the statute makes it all the more clear and positive. The right to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed, or at least, to use reasonable care and skill to do so. This duty is violated if there is a failure to restore it to its former condition in all cases where the exercise of reasonable care and skill can effect a restoration. The rule which governs cases of this class is thus

stated by a writer of acknowledged accuracy and ability: "Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly within the provisions of the law, but also with the highest degree of care to prevent injury to the persons or property of those who may be affected by such acts. Hence, where a railroad company has been permitted to lay its track along or across a highway, it is bound to the use of every reasonable precaution to prevent injury to those passing along the highway, or crossing its track that is laid along or across the highway; and if it fails to exercise a proper degree of care,—not only such as is provided by statute, but also such as is rendered necessary by the character of the obstruction and its location, having reference to a like reasonable exercise of care on the part of those approaching the obstruction,—it becomes a nuisance to the extent of its injury to individual rights, and renders the company liable in damages for all the consequences": 2 Wood on Railway Law, sec. 271.

Possibly the rule is rather too strongly stated, but strong as the statement is, many well-considered cases give it adequate support. Our own cases recognize and enforce a rule very much the same as that stated by the author from whom we have quoted, although it is, perhaps, not quite so strongly stated: *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143; *Louisville etc. R'y Co. v. Phillips*, 112 Id. 59; 2 Am. St. Rep. 155; *Evansville etc. R. R. Co. v. Carsener*, *supra*.

In the case last cited it was said: "Leaving the highway in such a condition as to require the wheels of vehicles passing over the railroad track to be raised nine inches perpendicularly from the surface of the highway, in order to pass over the top of the rails, was *prima facie* a negligent interference with the free use thereof": *Indianapolis etc. R. R. Co. v. State*, 37 Ind. 489; *Johnson v. St. Paul etc. R. R. Co.*, 31 Minn. 283."

The facts in the complaint before us make a very much stronger case than the one from which we have quoted, and as the injury is shown to have been caused by the condition of the highway, combined with the negligent management of the hand-car, a strong case is made out.

At another place in the opinion from which we have quoted it was said: "A defendant who, in violation of an express statutory duty, places or causes an obstruction in a highway, will not be heard to say that he did not anticipate an injury which

was the direct result of his unlawful act when the person injured was without fault: *Wabash etc. R. R. Co. v. Locke*, 112 404; 2 Am. St. Rep. 193."

In harmony with the doctrine declared by the authorities we have cited is this statement in a text-book: "Where one has a license to interfere with a highway, as where a railroad company is authorized to lay its track along, under, or over a highway, the terms of the license, so far as it directs the manner of such interference, must be strictly complied with. Interference in any other mode is a public nuisance": 2 Shearman and Redfield on Negligence, 4th ed., sec. 359.

This statement luminously exhibits the law, for it goes back to the fundamental principle that he who unlawfully interferes with a highway creates a nuisance, and is liable in damages to one who suffers a special injury.

It is established law that a complaint which charges negligence in general terms is good on demurrer. This was proved to be the rule by our own decisions and by other authorities in a case recently decided, that of *Ohio etc. R'y Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638.

As all of the paragraphs of the complaint contain appropriate allegations charging the defendant with negligently failing to discharge its duty, they are good, irrespective of the negligence in running the hand-car. The superadded act of negligence, even if it does not strengthen the complaint, certainly does not weaken it. By showing a second wrong, and combining it with the first so as to form a continuous cause of action, the pleading was, as we believe, strengthened, and not weakened: *Indianapolis etc. R'y Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387.

The wrong of the defendant in negligently failing to restore the highway is, as we have seen, of itself sufficient to constitute a cause of action, and the additional act of negligence in the management of the hand-car, if not considered as adding strength to the complaint, cannot, at all events, detract from it; but we think that the fact that the defendant, by its own wrong, rendered the highway unsafe, made it necessary for it, in operating its road, to exercise care to prevent injury to one placed in danger by that wrong. We are not dealing with a case where the railroad company was not guilty of any breach of duty respecting the highway on which the plaintiff was traveling, but with a case where, in violation of a positive duty, it wrongfully interfered with a highway. Here the two

wrongs blend in one concurring tort. If the appellant was free from fault respecting the public highway, we add, to prevent possible misunderstanding, we should have an entirely different case, and one in which it may be that no action would lie.

A man who has managed hand-cars, or assisted in managing them, may express an opinion as to the rate of speed at which a hand-car was moving on a specified occasion. Mr. Lawson says that on questions of speed, "the opinion of an ordinary witness is admissible" *Expert and Opinion Evidence*, 462. The reason for the rule is, that velocity or speed is a subject which cannot be placed before a jury by a statement of the observed facts: *Bennett v. Meehan*, 83 Ind. 566; 43 Am. Rep. 78; *Loshbaugh v. Birdsall*, 90 Ind. 466; *Carthage T. P. Co. v. Andrews*, 102 Id. 188, 148; 52 Am. Rep. 653; *Louisville etc. R'y Co. v. Jones*, 108 Ind. 551; *Salter v. Utica etc. R. R. Co.*, 59 N. Y. 631; *Chicago etc. R. R. Co. v. Johnson*, 22 Am. Law Reg. 117; *Fulsome v. Town of Concord*, 46 Vt. 133.

Under the allegations of the complaint, it was competent for the plaintiff to prove the nature and extent of her injuries: *Ohio etc. R. R. Co. v. Hecht*, 115 Ind. 443.

It was entirely proper to permit a physician, speaking as an expert witness, to testify as to the effect of the injury: *Louisville etc. R'y Co. v. Wood*, 113 Ind. 544.

It is not error to refuse instructions asked after the argument has begun: *Bartley v. State*, 111 Ind. 858; *Terry v. Shively*, 93 Id. 413; *Jolly v. Terre Haute etc. Co.*, 9 Id. 417.

We do not doubt the power of the trial court to order a new trial when the verdict is wrong upon the evidence; this court, however, it is hardly necessary to say, will not weigh the evidence to ascertain where the preponderance is, but it will accept as trustworthy that deemed so by the jury and the trial court. This rule is applicable here, and makes it our duty to sustain the verdict.

Judgment affirmed.

GENERAL AVERMENT THAT PLAINTIFF WAS WITHOUT FAULT IS SUFFICIENT in an action for a negligent injury: *Ohio etc. R. R. Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638; *Potter v. Chicago etc. R. R. Co.*, 20 Wis. 533; 91 Am. Dec. 444. In an ordinary complaint upon negligence, it is not necessary to aver that the plaintiff has taken due care: *Thomson v. North Missouri R. R. Co.*, 51 Mo. 190; 11 Am. Rep. 443.

NEGLIGENCE WILL NOT BE IMPUTED TO ONE WHO TAKES ALL THE CARE WHICH PRUDENT CIRCUMSPECTION WOULD SUGGEST to avoid an injury: *Sullivan v. Vicksburg R. R. Co.*, 39 La. Ann. 800; 4 Am. St. Rep. 239; nor to

one from the mere fact of his being upon the track of railroad laid upon streets of city: *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155.

RAILROAD COMPANY MUST RESTORE HIGHWAY: *Little Miami R. R. Co. v. Commissioners of Green Co.*, 31 Ohio St. 338. Right of public to pass and repass over highway draws after it the right to require the road to be kept in repair by those upon whom the law has placed that burden, and the right to require the removal of all obstructions to its use: *Troy v. Cheshire R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177.

SPEED OF RAILROAD CARS. — Such motion is to be compared to the motion of any other moving thing with a view to obtaining the judgment of the witness as to its velocity. The fact of witness being accustomed to observe an object of such size and momentum would only go to the weight of the testimony, and not to its admissibility: *Detroit v. Van Steinberg*, 17 Mich. 105. Persons having experience in certain trades are permitted to give their opinions in evidence: *Hammond v. Woodman*, 41 Me. 177; 66 Am. Dec. 219, note 243; *Sikes v. Paine*, 10 Ired. 280; 51 Am. Dec. 389; *Jones v. Finch*, 37 Miss. 461; 75 Am. Rep. 73.

EVIDENCE MAY BE ADMITTED TO SHOW EXTENT OF INJURY: *Kerr v. Forge*, 54 Ill. 482; 5 Am. Rep. 146; *Schroeder v. C., R. I., & P. R. R. Co.*, 47 Iowa, 375; *Buel v. New York Central R. R. Co.*, 31 N. Y. 314; 88 Am. Dec. 271. For opinions of witnesses generally, see note to *Hammond v. Woodman*, 66 Am. Dec. 228. That a physician's testimony is admissible as to the result and probable effect of the injury, see *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432, note 450.

INSTRUCTIONS. — In some jurisdictions, the request for instructions must be made before argument: See note to *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 124. Such a rule ought to be regarded as binding by counsel, but cannot be laid down as an unbending rule of law: *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 162.

STRINGER v. FROST.

[116 INDIANA, 477.]

NEGLIGENCE — LIABILITY OF INFANT. — AN INFANT WILL BE LIABLE FOR DAMAGES for negligently riding his horse upon and injuring a foot-passenger who is crossing a public street and neglecting no reasonable precaution which would have prevented the collision.

FOOT-PASSENGER CROSSING, or about to cross, a public street should look and take precautions according to the character of the thoroughfare, so as to avoid collision with approaching horsemen or vehicles; but the same degree of care is not required as at railroad crossings.

THE RIGHTS OF FOOT-PASSENGERS IN THE PUBLIC STREETS are equal with those of persons mounted on horseback or driving in carriages.

EVIDENCE. — AN OBJECTION TO EVIDENCE as being "incompetent, immaterial, and irrelevant" is not sufficiently specific.

EVIDENCE AS TO THE AMOUNT OF TRAVEL UPON A PUBLIC STREET over which defendant was riding will be admitted as tending to show the impropriety of the defendant's conduct in riding at an immoderate rate of speed.

M. L. Graff, for the appellant.

J. B. Harper and W. G. Colerick, for the appellee.

MITCHELL, J. Action by Harriet Frost against Elza T. Stringer and his minor son, Frederick O. Stringer, to recover damages alleged to have been wrongfully inflicted by the defendant Frederick O. Stringer upon the plaintiff, in negligently riding his father's horse upon her while she was crossing a public street in the city of Fort Wayne.

The jury returned a general verdict in favor of the father, and against Frederick O. Stringer, and they also returned answers to special interrogatories submitted to them by the parties respectively.

On the appellant's behalf, it is contended that the answers to special interrogatories make it apparent that the plaintiff was guilty of contributory negligence, and that it was therefore error for the court to overrule his motion for judgment notwithstanding the general verdict.

It is doubtless the rule in cases of this nature, that a recovery will not be sustained whenever there is negligence on the part of the plaintiff contributing directly to or which was a proximate cause of the occurrence from which the injury arises, and that the burden is upon the plaintiff to show that the injury is not attributable to any want of proper care on his part: *Murphy v. Deane*, 101 Mass. 455; 3 Am. Rep. 390. We do not, however, concur in the view that this rule was violated, by overruling the appellant's motion for judgment.

The general verdict affirmed the defendant's negligence, and that the plaintiff was herself in the exercise of due care, and it is too well settled to justify the citation of authority that unless the facts specially found are in irreconcilable conflict with the general verdict, the general verdict must control.

It would serve no useful purpose to set out the interrogatories and the answers of the jury. It is quite sufficient to say they show beyond question that the defendant was culpably negligent in that at the time of the collision he was riding his horse at an improper rate of speed along a much used public street in a populous city, and at the same time looking in another direction from that in which he was rapidly proceeding; and that they do not show the neglect of the plaintiff to take any reasonable precaution which would have prevented the collision that occasioned the injury.

We agree that it is the duty of a person crossing, or about

to cross, a public street on foot, to look and take precautions according to the character of the thoroughfare, so as to avoid collision with approaching horsemen or vehicles; but it is obviously not necessary that the same high degree of vigilance should be demanded of a foot-man about to cross a public street, in order to avoid contact with a horseman, who is likewise under a duty to be on the lookout, and to have his horse under careful control, as is required at railroad crossings, over which engines and trains of cars are necessarily run at a rate of speed not readily governable: *Wendell v. New York Central etc. R. R. Co.*, 91 N. Y. 420; *Barker v. Savage*, 45 Id. 191; 6 Am. Rep. 66; *Williams v. Grealy*, 112 Mass. 79.

Unless the occasion is of an extraordinary character, persons have no right to ride or drive through the streets of a populous city at a rate of speed which makes it dangerous to foot-travelers using ordinary care, while trains of cars cannot be moved so that their speed may be arrested in a moment when foot-men are seen in the way.

The court committed no error in overruling the appellant's motion for judgment, notwithstanding the general verdict.

It is not necessary to discuss the sufficiency of the evidence. The plaintiff's testimony, which the jury must have accepted as true, sustains the verdict to the fullest extent.

Accepting the plaintiff's testimony, and it cannot be said that she was guilty of contributory negligence, or that the want of ordinary care on her part proximately or directly contributed to the injury. Foot-passengers have equal rights in the streets with those mounted on horseback or driving in carriages. Neither have a priority of right over the other. Both are bound to use reasonable care to avoid collision: *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 578; *Cotton v. Wood*, 8 Com. B., N. S., 568.

The plaintiff had the right to cross the street at the crosswalk or elsewhere, exercising such caution and prudence as the circumstances demanded to avoid being injured, while the defendant had the right to ride along the street, observing such watchfulness for foot-men, and having his animal under such control, as would enable him to avoid injury to others who had corresponding and reciprocal rights in the street: *Simons v. Gaynor*, 89 Ind. 165; *Murphy v. Orr*, 96 N. Y. 14; *Moebus v. Herrmann*, 108 Id. 349; 2 Am. St. Rep. 440; *Brooks v. Schwerin*, 54 N. Y. 343; *Daniels v. Clegg*, 28 Mich. 32; *Shapleigh v. Wyman*, 134 Mass. 118.

Children and infirm persons, as well as those who are of mature years, and in the vigor and activity of health, have the right to walk along or across the streets of a city, observing such care as persons of like age and condition are accustomed to use, and all have a right to assume that carriages will not be driven, or horses ridden, over the streets at an improper rate of speed: *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

It cannot, therefore, be said, as a matter of law, that one is guilty of negligence who does not anticipate and take special precautions against injury from the reckless and improper conduct of others in riding or driving at an unusual and dangerous rate of speed: *Coombs v. Purrington*, 42 Me. 332; *Boss v. Litton*, 5 Car. & P. 407; *Williams v. Richards*, 3 Car. & K. 81.

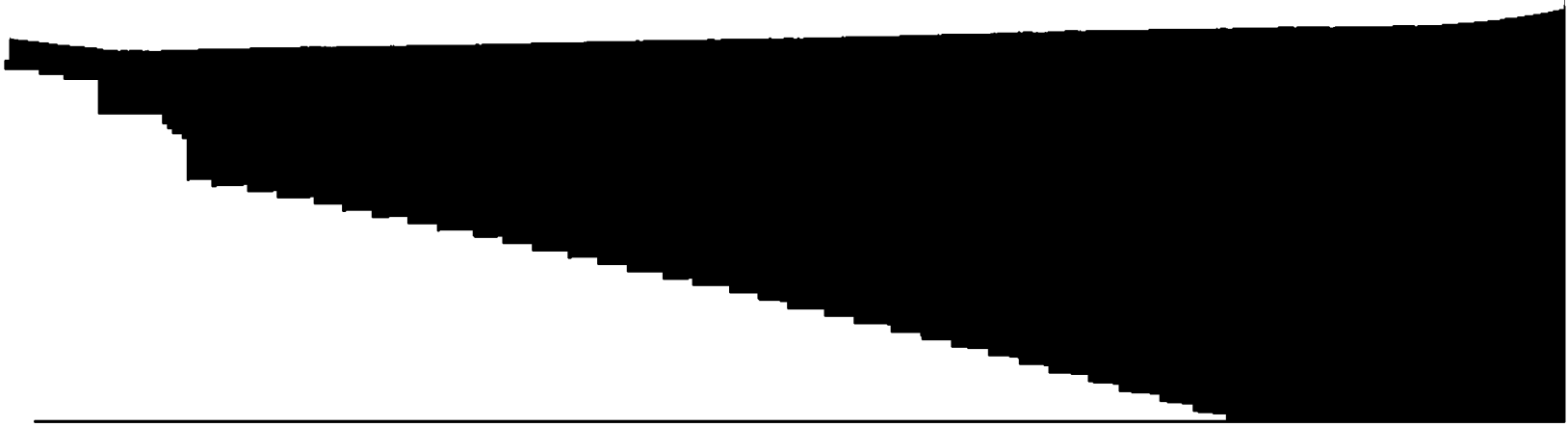
Some questions were asked of witnesses produced by the plaintiff below, which were objected to as "incompetent, immaterial, and irrelevant." It has often been decided that an objection of this general character, without more, presents no question for decision: *Bundy v. Cunningham*, 107 Ind. 360; *Chapman v. Moore*, 107 Id. 223; *Ohio etc. R'y Co. v. Walker*, 113 Id. 196; 3 Am. St. Rep. 638.

A witness was also permitted to testify, over objection, that there was more travel upon the street over which the defendant was riding at the time he ran upon the plaintiff than upon any other street in the city of Fort Wayne. As tending to show the impropriety of the defendant's conduct in riding at an immoderate rate of speed, this evidence was competent.

The alleged modification of the instructions asked by the appellant presents no question which requires a reversal of the judgment.

The judgment is affirmed, with costs.

RIGHTS OF FOOT-PASSENGERS. — It is not the purpose of this note to treat of the right of foot-travelers to recover for injuries received from defective highways, streets, or sidewalks, nor from falling building material or other substances, while passing along or over such thoroughfares; but to treat simply of the rights of foot-passengers as compared with those of vehicles, or the drivers thereof, while both are attempting to pass along or upon a public thoroughfare. To proceed, then, it may first be stated that foot-men have no superiority of right in the streets over those mounted on horseback or riding in carriages. They have the right in common, each equally with the other; and, in its exercise, are bound to use reasonable care for their own safety, and to avoid doing injury to any others who may be in the exercise of the equal right of way with them: *Barker v. Savage*, 45 N. Y.



191; 6 Am. Rep. 66; 1 Sweeny, 288; *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 578; note to *O'Malley v. Dorn*, 73 Am. Dec. 408. The rule is thus stated in *Brooks v. Schwerin*, 54 N. Y. 343: "Foot-passengers and those in carriages have equal rights in the streets of a city, and both are required to exercise that degree of care and prudence which the circumstances of the case demands." See also, to the same effect, *Myers v. Dixon*, 3 Jones & S. 390. A foot-traveler attempting to pass in front of vehicles in the street has no right to make any nice calculations as to his chances of being injured. If he does make such calculations, and they prove incorrect, and result in his injury, he has no redress for his mistaken effort, as he has not exercised common or ordinary care: *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 578. It was the rule at one time in New York that it is the duty of a foot-man, in attempting to cross the street where moving vehicles are numerous, to look in both directions along the street in the vicinity of the crossing for a reasonable distance, and that a failure in this respect is contributory negligence, preventing recovery in case of injury: *Barker v. Savage*, 45 N. Y. 191; 6 Am. Rep. 66.

Later cases greatly modify this rule, for it is held in *Moebus v. Herrmann*, 108 N. Y. 349, 2 Am. St. Rep. 440, affirming *Murphy v. Orr*, 96 N. Y. 14, that a person on foot has the right to cross the street whenever he pleases, and the duty to look up and down the street before attempting to cross a railroad track does not attach to him. And so it is held that where a pedestrian is run over while crossing the street by a horse and wagon coming behind him from another direction and street, the fact that he does not show that he looked up and down the street before attempting to cross is not conclusive evidence, as a matter of law, that he was not in the exercise of due care, but the question should be left to the jury: *Bowser v. Wellington*, 126 Mass. 391; *Williams v. Grealy*, 112 Id. 79; *Shapleigh v. Wyman*, 134 Id. 118. The fact that a foot-man crosses the street elsewhere than at the usual crossing is not *per se* contributory negligence which will defeat an action against another who injures him by recklessly riding or driving against him: *Simons v. Gaynor*, 89 Ind. 165; *Raymond v. City of Lowell*, 6 Cush. 524; 53 Am. Dec. 57. So foot-passengers have the right to use the carriage-way as well as the sidewalk, and walking in the carriage-way is not of itself *prima facie* negligence or want of ordinary care: *Coombs v. Purrington*, 42 Me. 332; *Gerald v. Boston*, 108 Mass. 584. But a foot-man cannot compel a teamster who has a heavy load to turn out of the beaten track of the road if there is sufficient room for the former to pass: *Beach v. Parmeter*, 23 Pa. St. 196. It is not negligence for a woman to wear a sun-bonnet when crossing the street, although the bonnet may have prevented her from seeing in all directions at the time she was struck and injured by a rapidly passing wagon: *Shea v. Reems*, 36 La. Ann. 969.

Nor is it negligence *per se* for aged, infirm, or blind persons to walk untended upon the public streets. They have the same rights as the young, the active, and those whose eyesight is perfect; but such persons must exercise greater care in proportion to their disabilities: *Winn v. Lowell*, 1 Allen, 177; *Davenport v. Ruckman*, 37 N. Y. 568; *Peach v. Utica*, 10 Hun, 477; *Sleeper v. Sandown*, 52 N. H. 244; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504. In a late case in Massachusetts it is said that a blind man walking on the street is bound to use ordinary care only, and when injured by collision with a team, the jury should consider the blindness, other infirmities, and circumstances in determining what care was reasonably necessary to insure his safety: *Neff v. Wellesley*, 148 Mass. 487. But when a child of such tender

the public highway without any one to guard him, and is there run over and injured, there is no redress unless the injury was inflicted voluntarily, or through culpable negligence on the part of the driver: *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273; *Stock v. Wood*, 136 Mass. 353. But if the driver is negligent when the injury is sustained, as when he is driving a truck and looking around conversing with another driver behind him, and did not see the child until after he struck him, the parents may recover: *Moebus v. Hermann*, 38 Hun, 370; 108 N. Y. 349; 2 Am. St. Rep. 440. Where a pedestrian is struck and injured by coming in collision with the sled of a coasting party in the public streets, he cannot recover from the city compensation for injuries suffered, no matter whether the coasting is going on under a license from such city or not: *Schultz v. Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779; *Paulkner v. Aurora*, 85 Ind. 130; 44 Am. Rep. 1; *Pierce v. New Bedford*, 129 Mass. 534; 37 Am. Rep. 387; *Stock v. Boston*, 128 Mass. 583; *Ray v. Manchester*, 46 N. H. 59; 88 Am. Dec. 192; *Hutchinson v. Concord*, 41 Vt. 271; 98 Am. Dec. 584. The law in relation to the use of a *cul-de-sac* by foot-men is the same as that in relation to the use of public streets. In other words, when using such way they must exercise reasonable care, adapted to the circumstances of the case: *Danforth v. Durell*, 8 Allen, 242.

MAHER v. ÆTNA LIFE INSURANCE COMPANY.

[126 INDIANA, 486.]

EXECUTION SALE. — A BID MADE AND ACCEPTED WITHOUT MORE DOES NOT ACCOMPLISH A SALE, and the sheriff, in the exercise of the discretion vested in him, may permit the bid to be withdrawn, and may resell the property.

WHERE THE SHERIFF STRUCK OFF PROPERTY AT A FIGURE GREATLY UNDER ITS VALUE, BUT THE SALE NOT HAVING BEEN PERFECTED, a second sale at a much higher price was consummated, the redemption must be from the bid made on the final sale.

J. Baker and A. J. Padgett, for the appellants.

W. R. Gardiner and S. H. Taylor, for the appellee.

MITCHELL, J. The following appears to be the case as made by the record: On the 25th of January, 1882, Thomas Maher and his wife, Ellen, executed a mortgage on certain real estate owned by the husband, to secure the payment of a debt of two thousand five hundred dollars, due from the latter, with annual interest at seven per cent, payable to the Ætna Life Insurance Company in five years. The debt matured, and remaining unpaid, the insurance company foreclosed its mortgage, and took a personal judgment against Thomas Maher for \$2,882.52. A certified copy of the decree was placed in the hands of the sheriff of Daviess County, who, after due advertisement, offered the land therein described for sale in par-

cels. The plaintiff made bids upon the several parcels, aggregating six hundred dollars, whereupon the sheriff openly struck off and sold the land to the plaintiff.

It does not appear that the sheriff ever made any memorandum or other entry of the sale on the writ, or that he issued any certificate of purchase, but so far as appears it may be inferred that the sale was abandoned by mutual consent of the sheriff and the bidder immediately after the property was struck off. Subsequently the sheriff readvertised the land, and sold it to the insurance company for the full amount of the judgment, interest, and costs, the latter paying the amount of its bid and receiving a certificate of sale.

This was a proceeding by Maher and wife, by way of motion in the court below, based upon a showing of the above-mentioned facts, asking to have the last-mentioned sale set aside and vacated, and that the appellee should be held to the first sale. This motion was denied, and it is now insisted on behalf of appellants that the first sale exhausted the right of the insurance company in the land sold, and that the subsequent sale was hence without authority of law, and void.

It is undoubtedly true that a perfected or consummated decretal or execution sale of property exhausts the lien of the decree or judgment in respect to the property sold, and that the judgment creditor cannot resell the same property until it is redeemed by the owner, or some person claiming under him, so as to vacate the first sale and reinstate the lien: *Hervey v. Krost*, 116 Ind. 268.

The infirmity in the appellants' position is, that it does not appear that the first sale was completed, so as to become binding, or to give those interested the right to insist upon its consummation. That the land was offered, and a bid made and accepted, without more, neither accomplished a sale nor conferred the right upon the execution defendants to enforce compliance with the bid.

Sheriffs' sales of real estate are subject to the provisions of the statute of frauds, and are hence not enforceable, even if otherwise unobjectionable, unless a sufficient memorandum has been made by the sheriff at the time: *Elston v. Castor*, 101 Ind. 426 (433); 51 Am. Rep. 754.

The law invests the sheriff with some discretion in making sales, and if for any reason the consummation of a sale, even after the property has been struck off, would operate with unusual and inordinate severity upon the debtor, by needlessly

surrendering his property, the sale ought not to be completed, especially if the purchaser consents to the withdrawal of his bid, as may be inferred was the fact in the present case: Freeman on Execution, sec. 288. Besides, a purchaser, whether he be the execution creditor or a stranger, may withdraw or refuse to pay his bid, in which case the sheriff or either of the parties to the writ may, if a sufficient memorandum has been made, enforce payment, with damages, as provided in section 760 of the Revised Statutes of 1881, or the sheriff may re-expose the property to sale, and hold the first purchaser liable for the deficiency, in case the amount bid at the second sale shall be less than the sum bid at the first, and the costs of the second sale: R. S. 1881, sec. 761.

It may be that the purchaser withdrew or refused to pay his bid, and that the sheriff, in the exercise of the discretion vested in him, deemed it the better course for all parties concerned to permit the bid to be withdrawn, or to decline to make the necessary memorandum so as to enable him to enforce payment and re-expose the property to sale.

Since it appears that the property brought more than four times as much at the second sale as at the first, it is not readily apparent how the appellants have been injured.

It is contended on the appellants' behalf that Ellen Maher, as wife, is entitled to redeem, and that it would be to her advantage to have the first sale perfected so that she may redeem from a six-hundred-dollar bid rather than from the larger one made on the second sale. Whether or not it would have been more advantageous to the debtor's wife in case the first sale had been perfected, and whether, if it would, that would constitute a reason for enforcing a sale of her husband's property at a nominal price rather than for a price more nearly proportionate to its value, presents questions which we need not consider, since, as we have already seen, within the discretion lodged with the sheriff, the sale was not so far completed as to be enforceable. There was no error.

The judgment is affirmed, with costs.

BID AT AN EXECUTION SALE, if not paid within a reasonable time, may be disregarded, and a resale of the property had. The bidder acquires no property before he has paid his bid: *Hardesty v. Wilson*, 2 Gill, 481; 41 Am. Dec. 439; *Durnford v. Degruya*, 8 Mart. (La.) 220; 13 Am. Dec. 285, note 287. Officer may adjourn sale, if it be done for good motives: *Russell v. Richards*, 11 Me. 371; 26 Am. Dec. 532, note 536.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY CO. v. BUCK.

[116 INDIANA, 506.]

NEGLIGENCE — DAMAGES. — The law will imply substantial pecuniary loss in some amount to a wife and child from the death of their husband and father, who was at the time presumably receiving wages, and who was therefore possessed of the ability to discharge his obligation to support those dependent upon him. No precise rule for estimating the loss recoverable can be laid down. Upon a showing of the relation, duty, and disposition of the person whose death has been caused toward those for whose benefit the suit is brought, the matter is then to be submitted to the jury.

PLEADING. — IN A SUIT FOR DAMAGES against the party whose negligence was the cause of the death, a general averment of damages is sufficient.

SUNDAY LAW. — If a man is killed while acting in disobedience to the Sunday law, such disobedience not being the efficient cause of the injury received, his personal representatives will not be deprived of their right of action against a party whose negligent omission to perform a legal duty was the real cause of the death.

SPECIAL VERDICT — INSTRUCTIONS. — Where the jury has been required to return a special verdict, general instructions as to the law of the case are not proper.

MASTER AND SERVANT. — AN EMPLOYEE HAS A RIGHT TO ASSUME that his employer has supplied machinery free from latent defects which may expose the employee to hidden perils.

SPECIAL VERDICT. — If the jury in a special verdict fail to find as to certain facts, the court may assume them as not proved. But if such failure be contrary to the evidence, it may be sufficient reason for a new trial, but not grounds for a *venire de novo*.

EVIDENCE. — DECLARATIONS OF A DECEDENT MADE IMMEDIATELY after he was injured, and substantially while he was being extricated from under the wheels of the car which had passed over him, will be admitted in evidence as part of the *res gestæ*.

G. W. Easley, G. R. Eldridge, G. W. Friedley, S. O. Bayless, T. L. Sullivan, and A. Q. Jones, for the appellant.

J. R. Coffroth, T. R. Stuart, and E. P. Hammond, for the appellee.

MITCHELL, J. Buck, as administrator of the estate of George H. Bennett, deceased, commenced suit against the Louisville, New Albany, and Chicago Railway Company, alleging that the company had wrongfully caused the death of the decedent, to the damage of his surviving widow and child.

The complaint was in three paragraphs. It is charged in the first two paragraphs that the intestate was in the employ of the railway company as brakeman, and that he was fatally injured while uncoupling cars, on account of dangerous and

defective appliances and machinery, which the company negligently supplied.

The same facts, substantially, were stated in the third paragraph, with the addition, that the accident and fatal injury to the plaintiff's intestate was caused by the careless and negligent habits and by the incompetency of the engineer who had control of the engine at the time the accident happened, and that the incompetency and negligent habits of the engineer were known to the company, and unknown to the intestate.

No question is made as to the sufficiency of the complaint, except it is urged that it does not sufficiently appear by any averment therein that the widow or child of the decedent sustained damage in any wise on account of the defendant's negligence.

The averments in the complaint relevant to the point thus made are, that Bennett was in the employment of the defendant as brakeman at the time of his death, and that he left surviving him as his next of kin and only heirs his widow, Fidella J. Bennett, and his daughter, Longretta May Bennett, both of whom are still living, the latter being four years of age.

It is also averred that "said administrator brings this action for the use and benefit of said widow and child, who, by reason of the death of said decedent as aforesaid, had sustained damages in the sum of ten thousand dollars."

For the appellant it is insisted that the general averment that the widow and child of the decedent had sustained damage in a specified sum was not sufficient, but that the pecuniary loss, either present or prospective, resulting to them from the intestate's death should have been specially pleaded. *Regan v. Chicago etc. R'y Co.*, 51 Wis. 599, is relied on to sustain the view thus contended for.

Without pointing out the distinction between the case cited and that under examination in respect to the question involved, it is sufficient to say it appears in the complaint in the present case that the decedent was, at the time of his death, in the employ of the railroad company as a brakeman, and that he left a widow and one child four years old. It is an unavoidable inference, therefore, that he was in the vigor of manhood, and that he was, at that time, engaged in earning money for the support of his wife and child: *Kelley v. Chicago etc. R'y Co.*, 50 Wis. 381.

Section 284, Revised Statutes of 1881, gives a right of action to the personal representative, for the benefit of the widow and children, or next of kin, of one whose death has been caused by the wrongful act or omission of another, provided the former could have maintained an action against the latter had he lived.


While there is some discord in the decisions of courts in respect to the right to maintain the action, even for nominal damages, without averring and proving actual pecuniary loss by those for whose benefit the suit is brought, there can be no doubt but that, within the rule generally prevailing, the law will imply substantial pecuniary loss in some amount to the wife and child from the death of one who sustained the relation of husband and father to them, and who was at the time presumably receiving wages, and who was, therefore, possessed of the ability to discharge his obligation to support those dependent upon him: *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543; *Houghkirk v. President etc. D. & H. C. Co.*, 92 N. Y. 219; 44 Am. Rep. 370; Shearman and Redfield on Negligence, 4th ed., sec. 137.

Whatever the rule may require as applied to other cases, and in respect to the *quantum* or character of proof on the subject of pecuniary loss, there can be no doubt but that a general averment of damages in a case like the present is sufficient as against a demurrer to the complaint. It may be well to observe here, as applicable to this question, which is presented in another aspect later on in the record, that no precise rule for estimating the loss recoverable under the statute can be laid down. When the relation of the party whose death has been caused to those for whose benefit the suit is being prosecuted has been shown, and his obligation, disposition, and ability to earn wages or conduct business, and to care for, support, advise, and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of justice of the jury: *Board etc. v. Legg*, 93 Ind. 523; 47 Am. Rep. 390; *Tilley v. Hudson etc. R. R. Co.*, 29 N. Y. 252; 86 Am. Dec. 197; *Castello v. Landwehr*, 28 Wis. 522.

The jury returned a special verdict, which, so far as they are material to the questions for decision, exhibited the following facts: The deceased, a man about thirty years of age, in good health and of industrious habits, was in the employment of the defendant railroad company as brakeman on a freight train. On Sunday night, November 25, 1883, the

train of which he was one of the crew left Michigan City for Lafayette. Between nine and ten o'clock, the train was stopped at the crossing of the Pan-Handle railroad for the purpose of taking on more cars. It was part of the duty of the decedent to couple and uncouple cars which were to be attached to or detached from the train. Soon after the train stopped, he went in between the engine and the car attached to it, for the purpose of uncoupling the car from the engine. The car was loaded with lumber, and belonged to the defendant company, but the decedent had never seen it until after it was loaded, when starting from Michigan City. The reach-rod, which, when properly adjusted, held the brake-beam in place, was, and had been for several days, absent from the brake-beam in front of the wheels on the car next the engine. The absence of this rod was unknown to the decedent, but the jury find that it was, or might have been, known to the defendant. Its absence caused the beam to hang lower and more forward than it otherwise would have done, but the fact that the rod was gone was not discoverable except by one stooping down and looking under the car. While attempting to uncouple the car, being for some reason unable to get the coupling-pin out of the draw-bar, the decedent held the pin up as far as he could get it, and then signaled the engineer to move the engine forward. The engineer obeyed the signal, but immediately, and without warning, reversed the lever and threw the engine back, crowding the decedent against the car, and then again moved forward. While so crowded back, and before he could recover or extricate himself from his position, the decedent's feet were caught by the defectively attached brake-beam, and he was thrown under, and run over by the car, which was moving forward. In this way he received injuries which are particularly described, and which resulted in his death the following morning. It was found that the decedent left a widow and child, as alleged in the complaint, and that they were damaged by his death in a specified sum. There was judgment for the plaintiff accordingly.

The appellant insists that the judgment ought to be reversed, and urges as one of the reasons, that the jury found that the injury which resulted in the intestate's death was received on Sunday while he was engaged in common labor in pursuance of a contract with the railway company, and that it was not made to appear that the work about which he was engaged was a work of necessity. We had occasion to con-



sider this question in *Louisville etc. R'y Co. v. Frawley*, 110 Ind. 18, where it was presented in substantially the same manner as in the present case. Our conclusion then was, that a person injured by the negligent omission of another to perform a legal duty would not be denied a recovery even though it appeared that the injured person was, at the time of receiving the injury, acting in disobedience of his collateral obligation to the state, which required of him the observance of the Sunday law. If the railway company violated its duty by furnishing machinery and appliances which it knew were defective, the danger to an employee who was required to use the appliances in ignorance of their defective condition was the same on one day as on another; that they were being used on Sunday rather than on Monday neither contributed to nor was it the efficient cause of the injury which gave rise to this action, nor can the railroad company now interpose and become the champion of the Sunday law as an excuse for its wrong, or to defeat a recovery: *Sutton v. Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534.

It is quite true that a plaintiff will, in no case, be permitted to recover when it is necessary for him to prove his own illegal act or contract as a part of his cause of action, or when an essential element of his cause of action is his own violation of law: *Holt v. Green*, 73 Pa. St. 198; 13 Am. Rep. 737; *Coppell v. Hall*, 7 Wall. 542, 558; *Steele v. Burkhardt*, 104 Mass. 59; 6 Am. Rep. 191; *McGrath v. Merwin*, 112 Mass. 467; 17 Am. Rep. 119.

But where he can prove his cause of action without proving that he was violating the law, even though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery may be sustained nevertheless: *Cooley on Torts*, 2d ed., 178, 179.

Whoever travels about from place to place for the purpose of gaming with cards, or otherwise, acts in violation of a criminal statute. It would hardly be claimed that a recovery against a common carrier would be denied if it appeared incidentally in evidence that a passenger injured through the carrier's negligence was traveling in violation of the statute against gaming. Why should a brakeman who is required to work in violation of the Sunday law be denied a recovery? The gist of the action in the present case is the negligent fail-

ure of the railway company to furnish safe and suitable appliances, whereby the death of the plaintiff's intestate was wrongfully caused while he was in the company's service as a brakeman. The contract of employment and the time when the injury occurred were mere incidents to and were in no respect the foundation of the action: *Louisville etc. R'y Co. v. Frawley, supra*; *Frost v. Plumb*, 40 Conn. 111; 16 Am. Rep. 18.

It may be conceded that the decisions in some of the states are not all consistent with the conclusions above stated; but in our opinion, these conclusions are in accord with the better view of the subject, and have the support of the weight of authority.

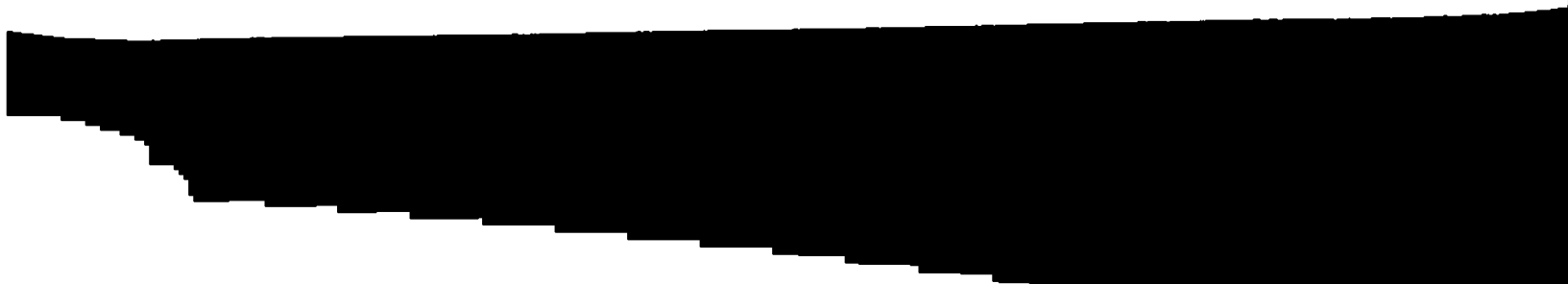
The defendant presented to the court forty-three separate instructions, and asked that they be given the jury. Of these, twenty were given, and the balance refused. The refusal to give these instructions is made a ground of complaint.

It has frequently been ruled that where the jury has been required to return a special verdict, general instructions as to the law of the case are not proper. The court should explain to the jury distinctly what facts are material to be found within the issues, and give them such instructions as will enable them to find and settle the facts, so that the law may be applied to the facts found by the court: *Louisville etc. R'y Co. v. Frawley, supra*; *Louisville etc. R'y Co. v. Flanagan*, 113 Ind. 488; 3 Am. Rep. 674.

Within this rule, an examination of the instructions given by the court leaves no doubt but that the jury were adequately directed in respect to the facts necessary to be covered by the special finding.

Leaving out of view all of the facts found relating to the alleged negligence and incompetency of the engineer, and eliminating from the special verdict everything in the nature of conclusions of law, it seems to us the facts found make a case justifying a recovery. They show that the railroad company failed in its obligation to supply its employee with safe and suitable appliances and machinery to do the work required of him, and that it required him to use machinery which it knew to be defective. This established the company's negligence.

The special verdict also shows that the defect in the machinery was unknown to the decedent; that it was not obvious, and could not have been discovered except by stooping down



and looking under the car. This showed that the employee was not guilty of contributory negligence in going in between the cars to uncouple them, notwithstanding the defective condition of the appliances.

It is settled beyond controversy that railroad employees are presumed to understand the nature and hazards of the employment when they engage in the service, and that they assume all the ordinary risks and obvious perils incident thereto. Such risks are presumably within the employee's contract of service: *Jenney Electric Light and Power Co. v. Murphy*, 115 Ind. 566.

This does not mean, however, that the latter may not repose confidence in the prudence and caution of the employer, and rest on the presumption that he has also discharged his duty, by supplying machinery free from latent defects, which expose the employee to extraordinary and hidden perils: *Indiana Car Co. v. Parker*, 100 Ind. 181; *Hough v. Railway Co.*, 100 U. S. 213.

While the employer may expect that an employee will be vigilant to observe and that he will be on the alert to avoid all known and obvious perils, even though they may arise from defective tools and machinery (*Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798), yet the latter is not bound to search for defects or inspect the appliances furnished him to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master, and unless the defects are such as to be obvious to any one giving attention to the duties of the occasion, the employee has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished: *Bradbury v. Goodwin*, 108 Ind. 286; *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Fort Wayne etc. R'y Co. v. Gildersleeve*, 33 Mich. 133; *Hughes v. v. Winona etc. R. R. Co.*, 27 Minn. 137; Wood on Master and Servant, sec. 376.

The facts found very clearly furnish a basis for the application of the foregoing principles, and these principles, when applied to the facts found, sustain the judgment of the court upon the special verdict. Many of the instructions asked would, if they had been given, necessarily have required the jury to return very much of the evidence as part of their special verdict, while others would have required the statement of mere conclusions, which the jury could not properly

draw. For example, in one of the instructions the court was asked to require the jury to find what was the proximate cause of the death of Bennett. In another, the court was asked to require the jury to describe in their verdict the appliances attached to the car for the purpose of breaking it. The facts showing the manner in which the accident and injury occurred, and the condition of the car and appliances attached having been particularly found and set out in the special verdict, it became a question for the court to determine whether or not the intestate's death was proximately caused by the negligent omission of duty on the part of the railroad company. We are unable to perceive how the court would have been aided in arriving at a correct conclusion if the jury had been required to describe the appliances in their verdict. The material facts in that connection were, that there inhered in the appliances a hidden or latent defect which increased the ordinary and obvious perils of the service in which the intestate was engaged, and which made them an efficient agency in producing the fatal injury.

We have examined the other instructions asked and refused, and without commenting upon them in detail, we need only say that the court committed no error in refusing them.

It is contended that the court erred in overruling a motion made by the appellant for a *venire de novo*. In this we do not concur. It must now be accepted as settled that a special verdict will not be considered as so uncertain, ambiguous, or defective as that no judgment can be rendered thereon because some of the issues in the case are not affirmatively or expressly settled or determined therein one way or the other. If the verdict is silent concerning any of the facts in issue, the court will assume, upon a motion such as that under consideration, that the party upon whom rested the burden of proof in respect to these facts, failed to prove them. If the failure to find the facts was contrary to the evidence, it may furnish a sufficient reason for a new trial, but the failure does not render the special verdict objectionable, nor does it afford any ground for a *venire de novo*: *Glantz v. City of South Bend*, 106 Ind. 305; *Deeter v. Sellers*, 102 Id. 458; *Mitchell v. Colglazier*, 106 Id. 464.

It may be conceded that there are some merely evidentiary facts found in the special verdict, and that it also embraces many statements which are essentially conclusions of law. Notwithstanding all this, it seems clear to us that, stripped

of all these, the verdict is yet sufficient to lead up to and support the judgment, and that the motion cannot be successfully urged on that account.

Questions are made and discussed concerning the propriety of rulings of the court in admitting evidence tending to show that the engineer who had the engine in charge at the time the decedent was injured was negligent and incompetent. According to our view of the case, there was no reversible error in any of these rulings, for the reason that the special verdict sustains the judgment, even though all the facts pertaining to the competency or conduct of the engineer be eliminated from the case. While we have discovered no error in the ruling, we do not regard them of sufficient materiality to justify us in prolonging the opinion by setting them out separately and examining them in detail.

The only other question which requires consideration relates to the ruling of the court in admitting in evidence certain declarations of the decedent, which were made immediately after he was injured, and substantially while he was being extricated from under the wheels of the car which had passed over him. The conductor of the train testified that he was on the caboose when he received notice that the decedent was hurt, and that he immediately ran forward and found him under the rear end of the second car from the engine. The following is the testimony of the conductor upon which the objection is predicated: "When I took him out I asked him, 'How did this happen?' He told me he was uncoupling the engine from the first car, but could not get the pin clear out of the draw-bar, and had to hold it up, and halloed to the engineer to go ahead. He started, and by some cause 'threw the engine over, and came back against him before he could get out, and crowded him back against the car, and the brake-beam, catching his leg, pulled him down, and the cars ran over him."

It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestæ*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which were the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the pres-

were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself: *Toledo etc. R'y Co. v. Goddard*, 25 Ind. 185; *Commonwealth v. McPike*, 8 Cush. 181; 50 Am. Dec. 727; *Lund v. Inhabitants etc.*, 9 Cush. 86; *Augusta Factory v. Barnes*, 72 Ga. 217; 53 Am. Rep. 838; *Insurance Co. v. Mosley*, 8 Wall. 397; *People v. Simpson*, 48 Mich. 474; *Keyser v. Chicago etc. R'y Co.*, 58 Id. 559; 56 Am. Rep. 405; *Kirby v. Commonwealth*, 77 Va. 681; 46 Am. Rep. 747; *City of Galveston v. Barbour*, 62 Tex. 172; 50 Am. Rep. 519; *State v. Horan*, 82 Minn. 394; 50 Am. Rep. 583; *Little Rock etc. R. R. Co. v. Leverett*, *supra*; *State v. Ah Loi*, 5 Nev. 99; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396, 402; *Durkee v. Cent. Pac. R. R. Co.*, 69 Cal. 533; 58 Am. Rep. 562; *Lambert v. People*, 29 Mich. 71; *Hill v. Commonwealth*, 2 Gratt. 594; *Jordan's Case*, 25 Id. 945; *Harriman v. Stowe*, 57 Mo. 93; *Entwhistle v. Feighner*, 60 Id. 215; *Elkins McKean*, 79 Pa. St. 493; *Hart v. Powell*, 18 Ga. 635; *Driscoll v. People*, 47 Mich. 413; *Casey v. New York etc. R. R. Co.*, 78 N. Y. 518; *McLeod v. Ginther*, 80 Ky. 399; Wharton on Evidence, secs. 258-267.

Any other rule would in many instances operate to defeat the accomplishment of justice, by excluding evidence of the most trustworthy character. While some of the cases cited above carry the doctrine to its extremest length, they all illustrate and apply the general principles consistent with the conclusions we have heretofore enunciated.

The declarations under consideration were made within not to exceed two minutes of the occurrence, while the declarant remained in the presence of the train, and the alleged defective machinery, which was instrumental in producing his hurt, and before he had been removed from the spot where he received his fatal injury. The surrounding circumstances, in the presence of which the declarations were uttered, were therefore silent witnesses in corroboration of his statement. This, taken in connection with the condition of the decedent, who was suffering under the shock of an injury from which he died in about six hours afterwards, necessarily excludes the idea of calculation or ability to manufacture evidence for future purposes. The court committed no error in admitting the evidence.

There are a number of incidental questions of minor im-

portance presented and discussed by counsel, but so far as they are material to the case as we have felt constrained to consider it, they have all been disposed of by what has preceded.

Without entering upon a detailed examination of the evidence which tends to support the verdict, we content ourselves with saying that while some of the criticisms of counsel seem plausible, and carry with them much force, we are nevertheless constrained to hold, since there was some evidence which the court and jury, whose duty it was to judge of its weight and credibility accepted as sufficient, that the judgment cannot now be disturbed.

The judgment is therefore affirmed, with costs.

MEASURE OF DAMAGES FOR INJURY RESULTING IN DEATH: See the note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 637-641; *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135, and note; *Louisville etc. R. R. Co. v. Stacker*, 86 Tenn. 343; 6 Am. St. Rep. 840; *Clapp v. Minneapolis etc. R. R. Co.*, 36 Minn. 6; 1 Am. St. Rep. 631.

SUNDAY. — ON THE QUESTION OF ALLOWING DAMAGES for injuries suffered by one while himself acting in disobedience to the Sunday law, the decisions are not at all uniform. That the action cannot be maintained, see *Day v. Highland Street R. R. Co.*, 135 Mass. 113; 46 Am. Rep. 447; *McGrath v. Merwin*, 112 Mass. 467; 17 Am. Rep. 119; *Wallace v. Merrimac River etc. Co.*, 134 Mass. 95; 45 Am. Rep. 301; *Bosworth v. Inhabitants of Swansea*, 10 Met. 363; 43 Am. Dec. 441. *Contra*, *Sutton v. Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534; *Schmid v. Humphrey*, 48 Iowa, 652; 30 Am. Rep. 414; *Baldwin v. Barney*, 12 R. I. 392; 34 Am. Rep. 670; *Platz v. City of Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286.

MASTER'S DUTY IS TO USE REASONABLE CARE IN FURNISHING SAFE APPLIANCES: *Gutridge v. Missouri Pac. R. R. Co.*, 94 Mo. 468; 4 Am. St. Rep. 392, and note; *Little Rock etc. R. R. Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Clapp v. Minneapolis etc. R. R. Co.*, 36 Minn. 6; 1 Am. St. Rep. 629; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206, note 213; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198; 59 Am. Rep. 68, note 75.

FACTS NOT INCLUDED WITHIN A SPECIAL VERDICT WILL NOT BE PRESUMED TO EXIST: *Lawrence v. Beaubien*, 2 Bailey, 623; 23 Am. Dec. 155; and a failure to find such facts will constitute no ground for a *verdict de novo*: *Ex parte Walls*, 73 Ind. 95; *Graham v. State*, 66 Id. 386.

DECLARATIONS OF PERSON INJURED, WHEN ADMISSIBLE AS PART of *res gestæ*: See note to *People v. Vernon*, 95 Am. Dec. 61; *Little Rock etc. R. R. Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230, and note 240.

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ACCOUNTS.

AN ACCOUNT SETTLED MUST BE REGARDED AS CONCLUSIVE BETWEEN THE PARTIES in the absence of proof showing errors of some kind. *Devocmon v. Shaw*, 422.

ADVERSE POSSESSION.

1. **POSSESSION SUFFICIENT TO DEFEAT RIGHT OF ACTION OF HOLDER OF LEGAL TITLE** must be hostile in its inception, and be so continued without interruption for the period of twenty years. It must be actual, visible, and exclusive, acquired and retained under claim of title inconsistent with that of the true owner; but it need not be under a rightful claim, nor even under a muniment of title. *Illinois Central R. R. Co. v. Houghton*, 581.
2. **ORAL DECLARATIONS OF CLAIM OF TITLE ARE NOT ESSENTIAL TO CONSTITUTE ADVERSE POSSESSION** on the part of the party in possession; it is sufficient if the proof shows that he has so acted as to clearly indicate that he did claim title. Using and controlling property as owner is the ordinary mode of asserting a claim of title, and no mere words can more satisfactorily assert such a claim. *Id.*
3. **DEED OF STRIP OF LAND FOR PURPOSE OF CONSTRUCTING, MAINTAINING, AND OPERATING RAILROAD TRACK** thereon conveys a right of possession exclusive and wholly inconsistent with the subsequent possession of the land, or any part of it, by the grantor or his assigns, for purposes of grazing or agriculture, or as a part of the farm to which it originally belonged, although it may not convey an estate in fee. And if such grantor and his assigns continue to use and occupy a portion of such strip of land as they use the residue of the farm, claiming to be the owners thereof, their possession is adverse, and if continued for twenty years, will bar the grantee's right to bring an action for its recovery. *Id.*

See CO-TENANCY, 2-4; EJECTMENT, 4, 6; MORTGAGES, 4; TRUSTS AND TRUSTEES, 16.

AGENCY.

1. **ACTS AND DECLARATIONS OF AGENT — EVIDENCE.** — Agent's acts, during the progress of a transaction, while representing his principal, are so far part of the *res gestae* as to be subsequently admissible in evidence on behalf of either party, and whenever his acts are admissible, then his declarations explanatory of those acts are also admissible; and it is not necessary that the agent himself be called to prove them. *Sidney School Furniture Company v. Warsaw School District*, 124.
2. **NONSUIT — ACTION FOR PRICE OF GOODS SOLD — DELIVERY — AGENCY.** — It is error for the court to direct a nonsuit in an action to recover the

execution of the contract, and that it was authorized by the board, the shipment of the goods according to the terms of the contract, and the declarations of the secretary of the board, to whom the goods were to be shipped, when called upon by the plaintiff's agent for a settlement, that the goods had arrived at their destination, but would not be received, as the board had rescinded the contract. There was sufficient evidence of a delivery, and under the circumstances it was not necessary to show the authority of the plaintiff's agent to demand a settlement, or that a demand had been made upon the board instead of upon the secretary. *Id.*

3. **EVIDENCE.—DECLARATIONS OF AGENT.**—Agent's authority cannot be shown by his own declarations; and in order that a party who avails himself of the act of an agent may give in evidence the agent's declarations to charge the principal, the burden of proof lies upon him to prove the authority under which the agent acted, and that the declarations were within its limits. *Baltimore and Ohio Employees' Relief Ass'n*, 147.
4. **DECLARATIONS OF SERVANT DISTINGUISHED FROM THOSE OF AGENT.**—Declarations of a servant are more jealously guarded as evidence against the principal than are those of an agent. *Id.*
5. **DECLARATIONS OF PAY-MASTER OF RAILROAD COMPANY.**—Pay-master of a railroad company is a servant, and not an agent, of the company, he having no discretion, and his duties being purely ministerial, and therefore his loose declarations are not binding upon the company. *Id.*
6. **AGENT IS PERSONALLY LIABLE ON A NOTE SIGNED IN HIS NAME**, though he adds thereto the designation "agent," unless from some portion of the note or the paper upon which it is written the name of his principal appears. *Hobson v. Hassett*, 193.
7. **NEGLIGENCE.—PRINCIPAL IS BOUND BY ACTS AND CONDUCT OF HIS AGENT**, and if he suffers an injury through the negligence of another, but to which the negligence of his agent or servant, while engaged in the business of his employment, contributed, there can be no recovery. *Nesbit v. Town of Garner*, 436.

See **ASSUMPT**, 2; **BANKS AND BANKING**; **CARRIERS**, 6, 16; **CONTRACTS**, 12-16; **CORPORATIONS**, 11; **INSURANCE**, 2, 3, 9, 10.

AMENDMENTS.

See **JUDGMENTS**, 3, 4; **PLEADING**, 2, 3.

ANCIENT DEEDS.

See **EVIDENCE**, 7.

APPEAL.

1. **REVERSAL WILL NOT BE ORDERED ON ACCOUNT OF THE ADMISSION OF IMMATERIAL EVIDENCE**, where it does not appear that the jury acted upon it to the prejudice of the appellant. *Ment v. Home Ins. Co.*, 153.
2. **PRACTICE.—THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN ANY PARTICULAR FINDING** cannot be questioned under a general specification that "there was no evidence which proved or tended to prove that the plaintiff at any time complied with or performed all the conditions or any of the conditions of the contract of insurance by him to be performed."

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3. APPELLATE COURT WILL NOT DISTURB FINDING OF JURY on a question as to the credit which ought to be given to the evidence. *Henry v. City and Pacific R'y Co.*, 457.
4. COSTS. — UNDER RULES OF IOWA SUPREME COURT, APPELLANT WILL BE TAXED WITH COST of printing the appellee's additional abstract; but cost of preparing an additional abstract by the appellee will not be taxed unless there is reason to believe that the appellant has intentionally omitted material matter from his abstract which his duty required him to submit to the court. *Schneitman v. Noble*, 467.
5. PRACTICE — CONSTRUCTION OF RULE OF COURT. — APPELLATE COURT WILL NOT DISTURB LOWER COURT'S CONSTRUCTION of its own rules, although it were doubtful, and admitting of an honest difference of opinion. Its construction will be presumed to be in harmony with the intention which the rule was adopted, and will be regarded as part of the rule itself, which the higher court will feel bound to follow. *Baldwin v. Louis, Keokuk, and Northwestern R'y Co.*, 479.
6. EVIDENCE. — ERRONEOUS ADMISSION OF EVIDENCE TENDING TO PROVE THAT PLAINTIFF in replevin suit sustained special damages, by being deprived of the possession of the property, is no ground for the reversal of a judgment not including any damages. *Coleman v. Reed*, 484.
7. PARTY CANNOT COMPLAIN OF IMPROPER EXCLUSION OF EVIDENCE when after it is excluded, the objection is withdrawn, and there is nothing on the record to show that it could not have been introduced as well as the objection to it was withdrawn as when it was first offered. *Webster v. St. Louis, and Pacific R'y Co. v. McDougall*, 539.
8. ERROR IN INSTRUCTIONS BECOMES ENTIRELY IMMATERIAL in a case where the defendant merely stands upon the general issue, without pretending to make any other defense, and the plaintiff, by competent evidence wholly uncontradicted, establishes his right to recover the whole amount which he does recover. *Perin v. Parker*, 571.
9. IN ILLINOIS, APPELLATE COURT MAY RENDER FINAL JUDGMENT FOR PLAINTIFF, where there is no evidence tending to prove the issues controverted, so that the trial court would have been justified in directing the jury to find for the plaintiff. Whether or not the record contains evidence tending to establish a fact is a question of law for the court to decide. *Commercial Union Assurance Co. v. Scammon*, 607.
10. DOES NOT LIE TO SUPREME COURT WHERE AMOUNT INVOLVED IS LESS THAN ONE THOUSAND DOLLARS, unless there is a certificate by the justice of the appellate court that the case involves questions of law of such importance that it should be passed upon by the supreme court. *Mason v. Stubbings*, 620.
11. ERROR WHICH WORKS NO HARM IS NOT GROUND FOR REVERSAL. *Blanchard v. Lake Shore etc. R'y Co.*, 630.
12. EVIDENCE REVIEWED BY SUPREME COURT, WHEN. — Where the court instructs the jury to find for the defendant, or, what is the same thing, sustains a demurrer to the evidence, such action is the same as holding that the evidence is insufficient in law to sustain the action, if all that it tends to prove is admitted to be true; and when such action is assigned for error, the supreme court will look into the evidence in order to determine whether or not the ruling was correct. *Id.*
13. PARTIES NOT APPEALING. — Where one only of several parties appears to the appellate court, where the case is heard, and from which an appeal is taken to the supreme court, the latter court can only consider the case as it was in the appellate court. *Tyler v. Tyler*, 642.

will not reverse a judgment for error of the lower court in permitting a witness to be questioned on cross-examination as to matters not inquired of on the direct examination, and to be afterwards contradicted as to such matters, where they were merely collateral, and it is not apparent that the error could have any influence with the jury upon the issues of fact found by them. *State v. Chicago and Northwestern R'y Co.*, 769.

15. **PRACTICE—SETTING ASIDE VERDICT AS EXCESSIVE.**—Appellate court will not set aside a verdict as excessive, unless it is clearly apparent from the evidence that the jury were actuated by passion or prejudice, the trial court having refused to interfere on that ground. *Id.*
16. **PLEADING AND PRACTICE—RECORD ON APPEAL.**—Section 1846, Revised Statutes of Indiana, 1881, provides that "the prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the supreme court," and that "the bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved. Section 1883 provides that "in case of an appeal from a question reserved on the part of the state, it shall not be necessary for the clerk of the court below to certify in the transcript any part of the proceedings and record, except the bill of exceptions and the judgment of acquittal," and that "when the question reserved is defectively stated, the supreme court may direct any part of the proceedings and record to be certified to them." Under these provisions, where the clerk sets out the affidavit on which the accused was tried before a justice, together with the proceedings in the circuit court, the supreme court will consider the affidavit as part of the record, and ascertain therefrom what the charge was, if it is not shown by the bill of exception. *State v. Vanderbilt*, 820.

See **EXHIBIT**, 2, 3; **INSTRUCTIONS**, 7, 10; **TRIAL**, 3, 7.

ARBITRATION.

See **MECHANICS' LIENS**, 5.

ARREST.

1. **POLICE OFFICER ACTING IN GOOD FAITH**, and in the line of his duty, in making an arrest and suppressing a fight, may strike a reasonable blow for that purpose; and he is the judge of the force necessary under the circumstances, and not guilty of any wrong unless he arbitrarily abuses the power confided in him. To make him guilty of assault and battery, his act must be grossly unnecessary, excessive, wanton, and malicious. *State v. Pugh*, 44.
2. **POLICE OFFICER MAKING ARREST** is presumed to act in good faith, and his conduct ought not to be weighed against him in "gold scales." *Id.*
3. **POWER OF OFFICER.**—An officer who has been duly appointed, but who has not taken his oath of office, nor recorded his appointment, has the right, not only to command the peace, but to enforce it, and to arrest any one committing a breach of the peace in his presence. *State v. Dierberger*, 380.
4. **FORCE WHICH OFFICER MAY EXERCISE** in making an arrest is such as is necessary to overcome all resistance, even to the taking of the life of the party resisting, or one aiding or assisting him; and if the officer uses

no more force than is reasonably necessary to make the arrest, he is not guilty of any crime. *Id.*

5. **BURDEN OF PROOF ON STATE** to show unnecessary force by officer making arrest. Where an officer is on trial for murder in making an arrest, the burden of proof is on the state to show that the officer resorted to extreme and unnecessary force in seeking to make the arrest. *Id.*

ASSAULT.

See CARRIERS, 6; CRIMINAL LAW, 5, 6.

ASSUMPSIT.

1. **UNDER A COMMON COUNT IN INDEBITATUS ASSUMPSIT THE PLAINTIFF MAY RECOVER MONEYS DUE HIM UNDER A SPECIAL CONTRACT.** It is unnecessary to declare on such contract specially. *Devocmon v. Shaw*, 422.
2. **PAYMENT OF MONEY BY ONE PERSON UNDER INDEMNITY FOR ANOTHER** is, in general, equivalent to a payment made at the latter's request, the indemnity operating as a request. Where, therefore, a broker, employed by his principal to make sales of corn for future delivery, in a market whose rules, known to the principal, require the seller to advance margins on the price, sells the corn, and upon a rise in the price, after making a proper demand for the margins, which is refused, buys the corn necessary to fill his contract, the difference in price between the corn sold and that purchased becomes a debt recoverable, with interest, against the principal upon the common money counts, as money advanced by him to the principal's use at his request. *Perrin v. Parker*, 571.

ATTACHMENT AND GARNISHMENT.

1. **OF PROPERTY MAY BE EFFECTUAL IN A STATE WHEREIN PERSONAL SERVICE OF PROCESS ON THE DEFENDANT CANNOT BE HAD.** *McCann v. Randall*, 666.
2. **WHAT SUBJECT TO.** — A DRAFT ISSUED BY THE AUTHORITY OF THE UNITED STATES, and payable at its sub-treasury, may be reached by a bill in equity, authorized by the statutes of Massachusetts, although the payee cannot be personally served with process within the state, if the draft is in the possession of a person in the state on whom process is served. *Id.*
3. **DRAFT PAYABLE TO ORDER MAY BE ATTACHED IN EQUITY,** in the hands of a third person who has a lien thereon, though it has not been indorsed, and the court has no means to compel its indorsement. The court is, by statute, vested with power to devise means to reach and apply the property, and in any order it may make, it will recognize and protect the lien of the holder of the draft. *Id.*
4. **ONE IN WHOSE HANDS A DRAFT ON A SUB-TREASURY OF THE UNITED STATES IS ATTACHED** becomes answerable to the plaintiff for the amount thereof, if he permits or procures it to be thereafter indorsed and paid in contempt of the authority of the court under whose process it was attached in his hands. *Id.*
5. **RECEIPTOR OF ATTACHED PROPERTY MAY EXONERATE HIMSELF FROM LIABILITY** by proving any state of facts which shows that the officer is not under any liability either to apply the property to the debt of the attaching creditor, or to return it to the debtor or other owner. *Wright v. Dawson*, 724.

PERMITS IT TO RETURN to the custody of the defendant in attachment, who within less than four months after the levy of the writ files his petition in insolvency, and the property is received by his assignee and its proceeds applied to the benefit of his creditor. *Id.*

7. **INTERVENTION BY ATTACHMENT CREDITOR IN ACTION TO DISSOLVE PARTNERSHIP — VACATING APPOINTMENT OF RECEIVER.** — One who attaches partnership property in the hands of a receiver, appointed in an action for the dissolution of the partnership, has a right to intervene in such action for the purpose of asserting his lien under the attachment, and may attack the validity of the appointment of the receiver by a petition setting forth the facts upon which he relies, but he cannot attack such appointment in a summary proceeding by motion. *Jacobson v. Landolt*, 767.
8. **LIABILITY OF OFFICER FOR WRONGFUL LEVY.** — Actual notice to officer that chattels upon which he is about to levy an attachment are mortgaged is sufficient to put him on inquiry, although he does not know to whom the mortgage was given, and if he goes on and makes the levy, he is liable therefor to the mortgagee in an action for the possession or the value of the property. *Coleman v. Reel*, 484.
9. **LEVY OF ATTACHMENT ON MORTGAGED CHATTELS IS NOT VOID**, although the amount of the debt secured by the mortgage is not paid or tendered, as required by the Iowa statute (Laws of 1886, chapter 117, sections 1 and 4), in a case where an attaching creditor attacks the validity of the mortgage. And the provisions of said statute do not affect the requirement prescribed by Laws of 1884, chapter 45, that persons asserting claims to the mortgaged property must give notice of their claims to the attaching officer. *Hibbard v. Zenor*, 497.
10. **LEVY UPON GOODS IS NOT ACCOMPLISHED** until the officer has done some act with reference to the goods which would but for the writ amount to a trespass, and the levy will be valid and operative from that time only, and will not operate by relation from the time prior steps were taken to make the levy. *Id.*
11. **VALIDITY OF JUDGMENT AGAINST DEFENDANT IN ATTACHMENT SUIT CANNOT BE ASSAILED** by a garnishee of the defendant in a collateral proceeding upon the ground that notice of the action was not duly served upon such defendant, if there was a service in fact, though imperfect, but which the trial court determined to be sufficient to give jurisdiction. *Schneftman v. Noble*, 467.
12. **ESTOPPEL BY PLEADING.** — **GARNISHEE IN ATTACHMENT SUIT IS ESTOPPED FROM CLAIMING** proceeds of certain notes on the ground that the notes had been turned over to him by the attachment defendant in satisfaction of a debt, by the fact that, after he received the notes, he brought an action against such defendant to recover the same debt, alleging that it had not been paid, whereupon a judgment was rendered in his favor. And this is so, although he commenced the action on the advice of counsel to perfect his title to the notes, not intending to release any right which he had to them. *Id.*
13. **ESTOPPEL OF GARNISHEE TO DENY INDEBTEDNESS.** — Although the plaintiff in an attachment suit was induced by the garnishee therein to begin the action and to garnish him, solely on the faith of representations made by the latter that he was indebted to the defendant in the action, and that he held funds of the defendant liable to garnishment,

thus leading the plaintiff to incur expense and trouble, yet the garnishee is not thereby estopped from denying his indebtedness to the defendant, and he is at most only liable to the plaintiff for the actual expenses incurred by him in reliance upon the representations. *Henderson v. McMahon*, 472.

ATTORNEY AND CLIENT.

LIMITATION OF ATTORNEY'S POWER TO BIND HIS CLIENT BY STIPULATION.

— An attorney employed by a railway company in proceedings to condemn land for a right of way has no power to bind the company by his stipulation or agreement as to the plan of constructing the road, where no special authority has been given him to do so. *Wabash, St. Louis, and Pacific Railway Co. v. McDougall*, 539.

See NEGOTIABLE INSTRUMENTS, 7; TRIAL, 4-6.

BANKS AND BANKING.

IN ABSENCE OF SPECIAL AUTHORITY, CASHIER OF BANK CANNOT TRANSFER notes of the bank in payment of a deposit so as to bind the bank. And the depositor receiving the notes will be regarded as holding them, or their proceeds, in trust for the bank, subject to garnishment by its creditors. *Schneitman v. Noble*, 467.

BETTERMENTS.

See EJECTMENT, 4, 7.

BIGAMY.

JURISDICTION. — BIGAMY IS COMMITTED by the act of marrying one woman while the wife by a former marriage is still alive, and the first contract of marriage is still in force; and in Kentucky the act must transpire in that state in order to be subject to indictment and punishment by its courts. *Johnson v. Commonwealth*, 269.

BILLS OF LADING.

See CARRIERS, 9-14.

BONA FIDE PURCHASERS.

See LIT PENDENS, 1, 2; NEGOTIABLE INSTRUMENTS, 5

CANCELLATION OF INSTRUMENTS.

See EQUITY, 2, 3.

CARRIERS.

1. OF PASSENGERS — DUTY OF DRIVER OF STREET-CAR. — INSTRUCTION may be refused, "that it was not the duty of the driver of the street-car company to stop his train, and go ahead on foot to the crossing to see if a train was approaching, unless he had reasonable grounds to believe a train was approaching." The court could not, as a matter of law, adjudge that such caution could be dispensed with, and as there was no conductor or other person on the car to exercise such vigilance, the probability of danger imposed such duty on the driver. A sufficient force should be employed at an unguarded and dangerous steam-railroad crossing to avoid danger to passengers in street-cars. *Central Passenger Ry Co. v. Kuhn*, 309.

1. **OF PASSENGERS—NEGLIGENCE.**—Failure of steam-railroad company to properly provide for public safety at dangerous highway crossing does not relieve from negligence of its employees a street-railroad company whose track intersects the other. *Id.*
2. **OF PASSENGERS—CONCURRENT NEGLIGENCE.**—DEGREE OF DILIGENCE REQUIRED OF STREET-RAILWAY COMPANY AND STEAM-RAILWAY COMPANY DIFFERS, where action is for injury sustained by passenger of the former company by reason of negligence of driver in attempting to cross railroad track in front of approaching train, and the action is against both companies, and charges concurrent negligence against the latter. *Id.*
3. **EVIDENCE.**—IN ACTION FOR INJURY, THE FACT THAT COURT ENJOINED CITY ORDINANCE REQUIRING STEAM-RAILROAD COMPANY TO HAVE FLAG-MAN at crossing cannot avail street-car company for the gross negligence of its employee, resulting in the alleged injury at the crossing, although both companies were co-defendants. *Id.*
4. **PASSENGER WHO LEAVES A STREET-CAR ON WHICH HE WAS RIDING** without advising the person in charge that he left it temporarily and intending to return and claim his place, ceases to be a passenger, and loses his right to be protected as such. *Central Ry Co. v. Pencock*, 425.
5. **IF STREET-CAR DRIVER LEAVES HIS CAR AND ASSAULTS ONE WHO HAD BEEN A PASSENGER** thereon, but who had left the car and was then walking on the street, the company is not answerable for such assault, although it arose out of an altercation in the car, and the person assaulted had left the car for the purpose of walking to the company's office to report the driver for alleged misconduct. The act of the driver is not within the scope of his authority. The contract of carriage terminated when the passenger left the car. *Id.*
6. **OF PASSENGERS—RIGHTS OF INTENDING PASSENGERS, WHEN CRASH.**—One remaining at a railroad station three or four minutes after he knows that the train which he wished to take had already gone, when there was nothing to detain him except his wish to take a street-car which would soon arrive at such station, ceases to have the rights of an intending passenger, and cannot recover for injuries sustained by him in attempting to leave the station by reason of the station door being closed, the station lights put out, and the passage by which he endeavored to depart insufficiently lighted. *Heinlein v. Boston and Providence R. R. Co.*, 676.
7. **OF PASSENGERS—ROUND-TRIP TICKET—ACCIDENTAL SEPARATION OF PARTS.**—Round-trip railroad ticket, punctured for the purpose of separation into two parts, and having on the going part the words "Not good for passage," on a line with the words "if detached" on the returning part, is good for a passage where the parts have become accidentally separated, if they are in good faith both presented to the same conductor on the going trip. *Wightman v. Chicago and Northwestern Ry Co.*, 778.
8. **BILL OF LADING DOES NOT POSSESS THE CHARACTERISTICS OF BILLS OF EXCHANGE**, or other negotiable instruments placed upon the footing of bills of exchange. A bill of lading does not represent money, but property; it is only negotiable in the sense that its true owner may transfer it by indorsement or assignment so as to vest the legal title in the indorsee. *Douglas v. People's Bank of Kentucky*, 276.
9. **OWNER OF BILL OF LADING MAY PLEDGE IT AS COLLATERAL SECURITY** for a debt; and possession of property in transit may be effected by trans-

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- ferring the bill of lading, such transfer being regarded as equivalent to investing the pledgee with actual possession. The title, however, is thereby vested in the pledgee; but he acquires a lien thereon, which, so long as he retains possession, either actual or symbolical, is a legal lien and will prevail against any prior equities existing on behalf of other parties, of which he had no notice, or of which he was not legally required to take notice. *Id.*
11. **ESTOPPEL. — CARRIER OF PROPERTY, WHICH, BY THE TERMS OF BILLS OF LADING, IS DELIVERABLE TO THE SHIPPER'S ORDER, IS NOT** AVOIDABLE for its value to the true owner if he delivers the property to a consignee, or any one else, without such order; but where the pledgee of the bills of lading has been permitted by the pledgee to present the bills to the carrier as his own, and so obtain the property, the pledgee is estopped to gainsay what he has thus sanctioned. *Id.*
12. **BILL OF LADING IS NON-NEGOTIABLE INSTRUMENT,** and possession thereof is not *prima facie* evidence of ownership, as in the case of a bill of exchange or promissory note. *Weyand v. Atchison etc. R'y Co.*, 504.
13. **LIABILITY FOR WRONG DELIVERY OF GOODS. —** A canning company shipped goods upon the order of one E., consigned to itself at P., where E. lived, taking two bills of lading, in fact duplicates, but neither showing that another had been issued. It then drew on E., through a bank at P., for the price, also sending to the bank an order on the carrier to deliver the goods to E., with directions to the bank to deliver the order to E. upon payment by him of the draft. At the same time the canning company sent one of the bills of lading to E., instructing him that the goods had been shipped, and that he was to pay the draft and obtain the order, such bill of lading not being indorsed or assigned by that company, and showing that the goods were consigned to the shipper. Upon presentation of this bill of lading, the carrier delivered the goods to E., who was at the time insolvent, and had never paid for the goods. Upon this state of facts, the delivery was unauthorized, and the carrier came liable to the canning company for the value of the goods, although it was ignorant of the fact of E.'s insolvency, and that the goods had been paid for, and that a draft and order had been sent in regard to the goods, but delivered them in good faith. *Id.*
14. **CUSTOM. — EXISTENCE OF LOCAL CUSTOM TO DELIVER GOODS TO PERSON HOLDING UNINDORSED BILL OF LADING,** unknown to the consignee when the goods were shipped, is no defense to an action for the value of the goods so delivered. *Id.*
15. **SHIPPING-RECEIPT — THROUGH-CONTRACT — CUSTOM. —** Through-contract is created by a shipping-receipt in the following form, and proof of evidence is inadmissible to show a custom limiting its effect as to the goods. "Milwaukee, —, 188—. — Shipped by Roundy, Peckham, & Co. following articles, in good order, to be delivered in like good order addressed, without unnecessary delay. — Consigned to Hansen & Kinnison, Onokama, Mich."; on the face of which the carrier's agent stamped and wrote: "F. & P. M. R. R. Co. — Rec'd Nov. 2d, 1887. — By agent, Milwaukee." *Hansen v. Flint and Pere Marquette R. R. Co.*, 791.
16. **AGENCY — PROOF OF AUTHORITY OF AGENT TO MAKE THROUGH-CONTRACT. —** Express authority of the agent of a common carrier to give receipt for goods, creating a through-contract, need not be proved, where he acted as such in the proper place for receiving goods for the carrier and was in possession of the carrier's stamp to be used on such receipt.

and the carrier took possession of the goods and caused them to be shipped, presumably with knowledge of the receipt. *Id.*

CONFLICT OF LAWS.

See FORGERY, 1, 2.

CONSPIRACY.

DISTINCT OVERT ACTS OF CONSPIRACY MAY BE GIVEN IN EVIDENCE when the issue is whether the accused is guilty of a general conspiracy; and when the issue is whether a party is guilty of a specific overt act of conspiracy, it is competent to give in evidence other overt acts of conspiracy, which include, or are dependent upon, or constitute a part of, the *res gestæ* of that act; but to prove a specific overt act, it is not admissible to give in evidence wholly disconnected and independent overt acts having no other relevancy to each other than that they are overt acts of the same parties. *McDonald v. People*, 547.

See INSTRUCTIONS, 9.

CONSTITUTIONAL LAW.

See WATERCOURSES, 1, 2.

CONTRACTS.

1. **CONSIDERATION. — AGREEMENT TO PAY THE EXPENSES OF ANOTHER PERSON, IF HE WILL TAKE A TRIP TO EUROPE**, in no way connected with the promisor's business, is upon sufficient consideration; and if the promisee takes such trip, he may recover the amount of his expenditures from the promisor. *Devecmon v. Shaw*, 422.
2. **PURCHASER OF REAL ESTATE IS ENTITLED TO WITHDRAW HIS DEPOSIT** and terminate his contract, where it calls for a perfect title, and the title of the vendor depends upon a deed executed by an attorney in fact, whose power of attorney was made prior to the acquisition of his principal's title, and upon a conveyance from a devisee, and the will under which such devisee claims has never been admitted to probate in this state. *Turner v. McDonald*, 189.
3. **PARTIES CANNOT, BY CONTRACT, VARY PROCEDURE IN COURTS OF JUSTICE** prescribed by the statute. A landlord cannot, therefore, by exacting from his tenant a power of attorney in his lease, obtain the right to an immediate judgment without having demanded possession or having process issued or served, or to an immediate writ of restitution, where the statute provides that in forcible entry and detainer a demand for possession must be made upon the tenant before the commencement of the action, a complaint in writing be filed before summons issues, service of summons be made in a manner different from the service in other actions at law, and in case of judgment, that no writ of restitution be issued in any case until the expiration of five days. *French v. Miller*, 651.
4. **MISTAKE AS TO THE EXISTENCE OR IDENTITY OF THE SUBJECT-MATTER OF A CONTRACT** is fatal to the contract itself, because of the want of the mutual assent necessary to its creation; but to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality or other collateral attributes is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold. *Hecht v. Batcheller*, 708.

5. **FRAUDULENT CONTRACT.** — A contractor is not precluded from recovering upon his contract to do certain work in the construction of a railway, by the fact that he entered into an agreement with an engineer in charge of such work that he would give the latter a certain percentage of the profits of the contract if he (the engineer) would, without impairing the character of the road, or doing anything to the disadvantage of the railroad company, make such variations, when it should be possible to do so, as would make the work of the contractor less expensive. Especially is this true when the work was done openly, and was in all respects indorsed by the company for which it was done. *Cox v. McLaughlin*, 164.
6. **RESTRAINT OF TRADE — USE AND OCCUPATION OF LAND.** — Limitation is reasonable, and will be enforced, which provides that "no intoxicating liquors are to be sold on said premises in less quantities than five gallons," and is inserted in a deed of land because the vendor's store and dwelling-house were near by. *Sutton v. Head*, 274.
7. **RESTRAINT OF TRADE.** — **INJUNCTION** is proper remedy against willful violation of restriction in deed not to sell on the premises conveyed spirituous liquors in a less quantity than five gallons. *Id.*
8. **RESTRAINT OF TRADE.** — A contract entered into between persons who are engaged in the manufacture of lumber, whereby one of them agrees to make and deliver, during a certain year, a certain quantity of lumber, and not to manufacture any lumber to be sold to any other person within four counties named, and to pay a certain sum per thousand for any lumber manufactured and sold to any other person, is in restraint of trade, against public policy, and void, where it appears that the contract was entered into for the purpose of limiting the supply of lumber, and increasing the price thereof, and giving one of the contracting parties the control of all lumber manufactured near a particular town in the year designated, and to control the supply of lumber for that year in the counties mentioned in the contract. *Santa Clara Valley Mill and Lumber Co. v. Hayes*, 211.
9. **ILLEGAL, IS ABSOLUTELY VOID**, both at law and in equity. It creates no obligation between the parties, and cannot form the basis of judicial proceedings. *Id.*
10. **ILLEGAL, INSTANCES OF.** — Among contracts illegal under the common law, because opposed to public policy, are contracts in general restraint of trade, — contracts between individuals or private corporations which keep up the price of articles of utility. *Id.*
11. **ILLEGAL, CANNOT BE DIVIDED AND HELD VALID IN PART** when the inducement thereto and the sole object in view was the formation of an unlawful combination, which cannot be separated from the other parts of the contract, and leave any subject-matter capable of enforcement. *Id.*
12. **WAIVER IS INTENTIONAL RELINQUISHMENT OF KNOWN RIGHT.** If a person acquainted with the custom and usage of the Chicago Board of Trade employs a broker to sell on the board for him a lot of corn for future delivery, the broker at the time neither demanding nor waiving his right to demand margins from him in case the exigencies of the business should make it expedient to do so; and if, on an advance in the price of corn, the broker demands of his principal a margin of three thousand five hundred dollars to make him safe, which the principal refuses to advance, saying that he would pay the losses when the differences should be adjusted, and not before; and if, the price of corn still advan-

ing. the broker makes two other demands for still higher margins, which being refused, he purchases the corn to fill his contracts, and sues his principal for the money paid for his use in making the purchase, these successive demands are not so inconsistent that the last will be held, as a matter of law, a waiver of all the previous demands. *Perin v. Parker*, 571.

13. WHERE PARTY CALLED UPON FOR MARGINS REFUSES TO PAY THEM, stating to his broker that he would furnish no margins until differences were settled or determined, he will be precluded from afterwards objecting that the demands were not sufficiently definite, and that some of them were for a larger amount than the broker was entitled to ask for. *Id.*
14. BROKER IS BOUND TO USE DILIGENCE TO PREVENT LOSS TO HIMSELF AND HIS PRINCIPAL by buying corn to meet his contract, when, by the latter's order, he buys corn for future delivery, if the principal gives him absolute and unconditional notice that he will not pay the margins demanded from him; but where the principal merely notifies the broker that he will not pay losses until the differences are adjusted, such notice is not to be regarded as an absolute and unconditional refusal, and the broker may buy the corn necessary to fill the contract at any time before he is bound to deliver, and hold the principal liable for the loss. *Id.*
15. MARGINS, AMOUNT OF, UPON WHAT BASED. — Where the rules of a particular market authorize a broker selling corn for future delivery to demand ten per cent margins of his principal, an instruction to the jury which, by necessary implication, excludes from its consideration, in considering the reasonableness of the broker's demand for margins, the right of the broker to demand ten per cent margins on the contract price, and limits his right to margins based upon the difference between the contract price and the market price, is erroneous, and properly refused. *Id.*
16. REASONABLENESS OF DEMANDS FOR MARGINS A QUESTION OF FACT. — In an action by a broker to recover moneys advanced to complete his contract of sales made for his principal, the question whether the demands of the broker for margins were reasonable is a question of fact, to be determined by the jury from the statements in the written demand and their context, and from a consideration of all the surrounding circumstances. *Id.*

See ASSUMPT, 1.

CORPORATIONS.

1. CORPORATION WHICH WILLFULLY FRUSTRATES OBJECT OF ITS INSTITUTION COMMITS FRAUD ON PUBLIC, and is not entitled to equitable consideration. *Appeal of Scranton Electric Light and Heat Company*, 79.
2. FORMED FOR PURPOSE OF FURNISHING CITY WITH ELECTRIC LIGHT, AND CLAIMING EXCLUSIVE PRIVILEGE THEREOF, IS NOT ENTITLED TO AID OF COURT OF EQUITY in restraining a rival company, after its stock has been purchased by the president of the gas and water company of the city for the purpose of destroying competition, and it is operated wholly in the interest of the latter company. *Id.*
3. LEGISLATIVE GRANT OF EXCLUSIVE PRIVILEGES TO CORPORATION IS TO BE CONSTRUED MOST STRICTLY, and every intendment not obviously in favor of the grant must be construed against it. *Id.*

4. **EXCLUSIVE PRIVILEGES CONFERRED BY SECTION 34 OF PENNSYLVANIA ACT OF 1874 DO NOT EXTEND** to companies formed thereunder for the purpose of furnishing light by electricity. *Id.*
5. **NOTICE OF MEETINGS OF DIRECTORS.** — Each director must, under the provisions of the Civil Code of California, have special notice of the regular meetings of the board, unless provision is made in the by-laws for such meetings. *Thompson v. Williams*, 187.
6. **NOTICE OF ADJOURNED MEETING OF THE DIRECTORS.** — If a regular meeting of the board of directors, of which no notice is required, is adjourned to the next day, but the hour to which it is thus adjourned is not stated, and two directors are not present at such regular meeting, and no notice is given of the adjourned meeting, and these two directors have no knowledge of it, an assessment levied at such adjourned meeting is a nullity. *Id.*
7. **SHARES OF STOCKS IN, ARE PERSONAL PROPERTY.** *Tregear v. Etiwanda Water Company*, 245.
8. **TELEPHONE COMPANY** incorporated under article 5, chapter 21, Revised Statutes of Missouri, has power to own and operate telephone lines, establish reasonable charges for the use of the same, erect poles along and across public roads and streets, and condemn private property for a right of way; but it is charged with the duty of receiving and transmitting messages with impartiality and good faith, and is subject to public regulations, including the right of the state to fix and prescribe a maximum rate for telephone service; and this power may be delegated to municipal corporations. *City of St. Louis v. Bell Telephone Company*, 370.
9. **NOT ESTOPPED FROM RECOVERING MONEYS FRAUDULENTLY MISAPPLIED BY TREASURER** in liquidation of his debt to another corporation by the fact that he fraudulently enters his misappropriation as loans from the wronged corporation to other persons from whom it attempts to collect such supposed loans. *Atlantic Mills v. Indian Orchard Mills*, 698.
10. **KNOWLEDGE OF OFFICER WHEN KNOWLEDGE OF CORPORATION.** — If the treasurer of a corporation pays his deficit to it by drawing checks upon another corporation of which he is also treasurer, no other officer of either corporation having knowledge of the true nature of the transaction when it occurred, the knowledge of such treasurer must be imputed to the corporation receiving such checks, and their receipt must be treated as wrongful, and as imposing a liability to repay their amount to the corporation against which they were drawn. *Id.*
11. **NOTICE OF FRAUD.** — **PRINCIPAL MUST BE REGARDED AS ACTING WITH KNOWLEDGE OF A FRAUDULENT ACT** when he is represented solely by an agent who has such knowledge. *Id.*
12. **DUTY OF INQUIRY.** — **CORPORATION RECEIVING FROM ONE OF ITS OFFICERS A LARGE AMOUNT IN CHECKS ON ANOTHER CORPORATION** payable to the order of the former, and to be used in discharge of the private debt of the officer to it, is put upon inquiry as to how such officer came by such checks, and to have the right to apply them in satisfaction of his private debt. *Id.*

See EMINENT DOMAIN, 2, 3; PAYMENT; PLEADING, 5, 6.

COSTS.

See APPEAL, 4.

1. CO-TENANT IS UNDER NO OBLIGATION TO PAY TAXES upon the moiety of another co-tenant. *Oglesby v. Hollister*, 177.
2. CO-TENANT'S ADVERSE POSSESSION, EVIDENCE OF. — The purchase by a co-tenant at a tax sale of the interest of another co-tenant, and the taking of a deed purporting to convey the same, are acts indicating his purpose to claim the whole title adversely to his co-tenant. *Id.*
3. TENANT IN COMMON, DISSEISIN BY. — One tenant in common may disseise another; but, *prima facie*, the possession of one is also that of the other. An ouster or disseisin is not to be presumed from the mere fact of sole possession, but it may be proved by sole possession accompanied by a notorious claim of exclusive right. There can be no disseisin or adverse possession until there has been a disclaimer by the assertion of an adverse title and notice thereof to the other co-tenant, either direct or inferable from notorious acts. *Id.*
4. OUSTER. — WHETHER ONE CO-TENANT HAS OUSTED ANOTHER is a question of fact for the determination of the jury whenever there is any substantial evidence of an ouster. A jury is warranted in inferring an ouster from the exclusive possession by one tenant in common for a great number of years without any accounting to or recognition of right in his fellow-commoner, or any evidence explaining why the co-tenant neglected to assert his right. *Id.*

See DEDICATION; PARTITION, 1, 2; VENDOR AND VENDEE, 2.

CRIMINAL LAW.

1. WHERE GENERAL CHARGE IN INDICTMENT IS RESTRICTED BY BILL OF PARTICULARS furnished to the defendant, instructions which wholly ignore such restrictions are erroneous. *McDonald v. People*, 547.
2. WHERE BILL OF PARTICULARS IS FURNISHED IN CRIMINAL CASE, the evidence to establish a conviction must be confined to the specifications therein contained. And where, in the trial of an indictment for a conspiracy to defraud a county by means of fraudulent bills for labor and materials, the prosecution, by order of the court, furnishes a bill of particulars relating only to bills for work and materials for the normal school, it is error to permit the prosecution to give evidence of other bills for labor and materials for the court-house, insane asylum, infirmary, and hospital, the bills relating to these different institutions, and the fraudulent pretenses relating thereto, having no immediate or direct connection with each other. The effect of the bill of particulars in such case is to narrow the issue to the fraudulent bills relating to the normal school, and to exclude evidence of all others. *Id.*
3. EVERY PERSON CHARGED WITH CRIME IS ENTITLED TO FAIR AND IMPARTIAL TRIAL; and it is the duty of the courts to see that the guaranty of such a trial, conferred by the laws upon every citizen, shall be upheld and sustained. *Id.*
4. CONVICTION OR ACQUITTAL AS BAR TO FURTHER PROSECUTION. — Where the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other. *State v. Cross and White*, 53.
5. ONE HAS THE RIGHT TO DEFEND HIMSELF IN HIS OWN DWELLING-HOUSE, and is not required to escape therefrom when assaulted therein, if he

believes, and has reasonable ground to believe, another is about to take his life, or inflict great bodily harm upon him. *Attep v. Commonwealth*, 260.

6. ONE HAS THE RIGHT, IN HIS OWN DWELLING-HOUSE, TO RESCUE AND DEFEND HIS WIFE, EVEN TO TAKING LIFE, where she is being assaulted and beaten, and he at the time believes, and has reasonable grounds to believe, she is in immediate danger of losing her life, or suffering great bodily harm. *Id.*
7. WHATEVER ONE MAY DO IN HIS OWN DEFENSE, ANOTHER MAY DO FOR HIM, EVEN TO KILLING, if he believes life is in immediate danger, or if such danger and necessity be reasonably apparent, provided the party in whose defense he acts was not in fault. He interferes, however, at his peril if the person slain was not in fault. *Stanley v. Commonwealth*, 305.
8. INSTRUCTION WHICH CONFINES THE RIGHT TO ACT IN DEFENSE OF ANOTHER TO THE EXISTENCE OF ACTUAL DANGER, and which does not allow the right to act in good faith upon appearances, however reasonable, is erroneous. *Id.*
9. VERDICT. — Where, during deliberation, a juror becomes sick and unable to continue, and the jury announce their inability to agree, but upon being polled, all announce a verdict of guilty on the first two counts and a disagreement on two other counts, whereupon the solicitor for the state enters a *nolle prosequi* as to the latter two counts, and the jury then return a verdict of guilty, there is no reviewable error, for while such method of polling the jury is not to be approved, still the action of the solicitor is, in legal effect, but consent to acquittal on the last two counts, and no injury could result to defendant therefrom. *State v. Cross*, 53.
10. DEVICES TO PREVENT PERSONS FROM ENTERING INTO OR CONTINUING IN THE EMPLOYMENT OF ANOTHER, as by threats, intimidation, display of banners, and the like, are illegal, both at common law and by the statutes of Massachusetts. *Sherry v. Perkins*, 689.
11. PROSTITUTION — EVIDENCE — AGE OF GIRL — MOTHER'S TESTIMONY. — Testimony of the mother is the best evidence as to the age of her child, in a criminal prosecution against a person for inducing or knowingly suffering a girl under the age of twenty-one years to resort to or be in or upon her premises for the purpose of being unlawfully and carnally known. *Hermann v. State*, 789.
12. JURY MAY DETERMINE FROM GIRL'S PERSONAL APPEARANCE WHETHER DEFENDANT KNEW SHE WAS UNDER AGE OF TWENTY-ONE. — Court may properly allow the jury to determine from the girl's personal appearance, or from view only, whether the defendant knew that she was under the age of twenty-one at the time the girl was suffered to resort to the defendant's premises for the purpose of prostitution, where the evidence showed that the girl was under the age of sixteen, in a criminal prosecution under a statute against a person for inducing or knowingly suffering a girl under the age of twenty-one years to resort to or be in or upon her premises for the purpose of being unlawfully and carnally known. *Id.*

See BIGAMY; FORGERY; LARCENY, 1, 2; HOMICIDE.

DAMAGES.

1. MEASURE OF DAMAGES — INSTRUCTION. — IN ACTION FOR INJURY CAUSED BY DEFENDANT'S NEGLIGENCE, testimony of plaintiff that he had a wife

is therefore not prejudicial, where, by its instruction, the court guides the jury plainly as to the compensation or damages the plaintiff is entitled to receive; and especially is it not prejudicial, where, in addition to the general instruction as to damages, the special interrogatory was propounded to the jury by the court, "What sum in damages will reasonably compensate the plaintiff for the injuries sustained by him?" and the response by the jury was, "We say five thousand dollars," and the verdict of the jury is also sustained fully by uncontradicted testimony of skilled surgeons and physicians as to the character and effect of the injury. *Central Passenger Ry Co. v. Kuhn*, 309.

2. **MASTER AND SERVANT — NEGLIGENCE — DAMAGES.** — The measure of damages in an action for injuries received by a servant in obeying an order incurring extra danger, and negligence on the part of the master, is compensation for the pain suffered, time lost, and permanent injuries incurred, together with expenses in being cured. *Stephens v. Hannibal and St. Joe R. R. Co.*, 236.
3. **VERDICT NOT EXCESSIVE.** — A verdict for eight thousand dollars damages, awarded in an action for personal injuries to the plaintiff, who was, at the time of the accident, a strong and active man, nineteen years of age, the injuries causing him excruciating pain for a long time, and compelling him to submit to a surgical operation by which a portion of the ankle-bone was removed, and the joints of his ankle and foot stiffened, making him a cripple for life, and unfitting him for manual labor, for which only he was qualified, is not excessive, and will not be disturbed on appeal. *Henry v. Sioux City and Pacific Ry Co.*, 457.
4. **PERSONAL INJURIES — FRIGHT.** — Passenger may recover for fright sustained, in an action against a railroad company for damages caused by the wrongful act of the conductor in directing her to leave the train at a place of danger, where the conductor, knowing the danger, directed her to leave the train in the night-time at a place several hundred feet from the platform of the depot of her destination, and she was thus compelled to walk along a side-track, in which there was an open culvert, into which she fell and was injured, and while endeavoring to extricate herself, she was frightened by the backing of trains on the track towards her. *Stutz v. Chicago and Northwestern Ry Co.*, 769.
5. **PERSONAL INJURIES — EVIDENCE AS TO EXTENT OF INJURIES.** — Evidence is admissible in an action by a married woman to recover damages for personal injuries caused by the wrongful act of the defendant, as tending to show the extent of the injuries, that by reason thereof she was unable to perform her work as she had previously done. *Id.*
6. **FUTURE SUFFERING.** — It is proper to instruct the jury, in an action to recover damages caused by the wrongful act of the defendant, that the plaintiff is entitled to recover for any further physical suffering which, from the evidence, is reasonably certain to result from the injury, where there is evidence tending to show that the plaintiff had not, at the time of the trial, fully recovered from the injuries sustained. *Id.*
7. **NEGLIGENCE.** — The law will imply substantial pecuniary loss in some amount to a wife and child from the death of their husband and father, who was at the time presumably receiving wages, and who was therefore possessed of the ability to discharge his obligation to support those dependent upon him. No precise rule for estimating the loss recoverable can be laid down. Upon a showing of the relation, duty, and dis-

position of the person whose death has been caused toward those for whose benefit the suit is brought, the matter is then to be submitted to the jury. *Louisville, New Albany, and Chicago R'y Co. v. Buck*, 883.

8. PLEADING. — IN A SUIT FOR DAMAGES against the party whose negligence was the cause of the death, a general averment of damages is sufficient. *Id.*

See EMINENT DOMAIN, 7-13; EXECUTIONS, 3; MASTER AND SERVANT, 19.

DEDICATION.

ATTEMPTED DEDICATION OF COMMON PROPERTY to a public use as a highway by one tenant in common without the consent of his co-tenants does not affect their rights *City of St. Louis v. Laclede Gas Light Co.*, 334.

DEEDS.

1. DEED ABSOLUTE, INTENDED AS A MORTGAGE, does not in California transfer title as between the parties to it. *Turner v. McDonald*, 189.
2. RESTRICTION IN, AS TO SALE OF LIQUORS ON THE PREMISES CONVEYED IS A COVENANT running with the land, and therefore effective against a tenant or assignee of the vendee. *Sutton v. Head*, 274.
3. PAROL EVIDENCE THAT LIMINATION AS TO USE OF LAND ENTERED INTO THE CONSIDERATION OF A DEED thereof is admissible, although deed may be silent as to it. *Id.*
4. REFORMATION. — EVIDENCE must be clear, positive, and convincing in order to so reform a deed as to include therein land claimed to have been omitted by mistake. *Turner v. Shaw*, 319.

See HUSBAND AND WIFE, 3, 4; MORTGAGES, 7; REGISTRATION.

EJECTMENT.

1. EVIDENCE ADMISSIBLE UNDER THE GENERAL DENIAL. — The defendant may, under the general denial in ejectment, introduce any evidence tending to defeat the plaintiff's title, and may, therefore, under such denial, show that the deed under which plaintiff claims is void because made in violation of the statutes of the United States concerning the disposal of public lands. *Sparrow v. Rhoades*, 197.
2. PRACTICE. — IN EJECTMENT, IT IS TOO LATE TO RAISE QUESTION IN SUPREME COURT FOR THE FIRST TIME AS TO THE RIGHT of the beneficial owner to maintain the action, at least without making the holder of the legal title a party. *Davidson v. Morrison*, 295.
3. IN ACTION OF EJECTMENT, COURT WILL NOT DISTURB FINDING OF COURT BELOW AS TO HEIRSHIP, even if it be conceded that the testimony preponderates in favor of plaintiff. *Id.*
4. VALUE OF IMPROVEMENTS MADE BY DEFENDANT — TITLE UNDER HOLDER OF LIFE ESTATE — ADVERSE POSSESSION AGAINST REMAINDERMAN. — Possession of one who enters under a deed from the holder of a life estate, purporting to convey the fee, and the grantor intending to convey the fee, and the grantee supposing he is getting the fee, becomes adverse to the remainderman immediately upon the death of the tenant for life, so as to entitle him from that time up to the time of the commencement of the action to the benefits of section 3096 of the Revised Statutes of Wisconsin, which provides that in case of a recovery of land on which the party in possession, or those under whom he claims, "while holding adversely by color of title asserted in good faith," shall have made perma-

ment and valuable improvements, or shall have paid taxes assessed, such party shall be entitled to have from the plaintiff the value of such improvements at the time of the verdict or decision against him, and the amount paid for taxes, with interest from the date of payment. *Barrett v. Stradt*, 796.

- FINDINGS AS TO CHARACTER OF DEFENDANT'S POSSESSION.** — Findings that during a certain time the defendant in an action of ejectment had exclusive possession of the premises, that he claimed to be the sole owner thereof under and by virtue of a deed to him, and that he asserted his title founded on such deed in good faith, are equivalent to an express finding that he was in possession during such time holding adversely under color of title asserted in good faith, so as to entitle him, under section 3096 of the Revised Statutes of Wisconsin, to the value of the improvements which he has made on a recovery against him. *Id.*
- 6. PRESUMPTION AS TO CONTINUANCE OF ADVERSE POSSESSION.** — Possession of defendant in ejectment will be presumed to have continued to be adverse, in the absence of evidence showing a change in its character, so as to entitle him, under section 3096 of the Revised Statutes of Wisconsin, to the value of the improvements which he has made, on a recovery against him, where the evidence shows that the defendant was at one time in possession of the land in question, holding adversely to the plaintiff under color of title asserted in good faith, and that such possession continued down to the commencement of the action. *Id.*
- 7. IMPROVEMENTS MADE BY DEFENDANT AFTER NOTICE OF PLAINTIFF'S CLAIM.** — Defendant in ejectment is entitled to the value of improvements made by him, even after notice of the plaintiff's claim, under section 3096 of the Revised Statutes of Wisconsin, on a recovery against him, where he entered into possession of the premises under color of title asserted in good faith. In order to change the nature of his adverse possession, there must not only be a knowledge that there is a better title, but there must be an express or implied yielding to such superior title. *Id.*

See EMINENT DOMAIN, 13.

EMINENT DOMAIN.

- 1. RAILROAD CROSSING LINE OF ANOTHER — PENNSYLVANIA ACT OF 1871.** — Pennsylvania act of 1871, relating to crossings of lines of railroads by other railroads, has no application where one railroad company attempts to run its line through the yard of another company, and to cross its yard-tracks and switches. *Appeal of Pittsburgh Junction R. R. Co.*, 128.
- 2. RIGHT OF ONE CORPORATION TO TAKE PROPERTY OF ANOTHER.** — Property already taken for one public use by a corporation cannot be taken by another corporation for another use, except by express grant or by necessary implication, although the franchises of a corporation are property, and may be taken under the power of eminent domain. *Id.*

4. **RIGHT OF ONE RAILROAD COMPANY TO TAKE PROPERTY OF ANOTHER. —**
Lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as right of way by another company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy; and this rule is not confined to the tracks or right of way of the company, but extends to the grounds occupied by all the appliances necessary for the successful operation of the road, and the company has a right to construct its road and make its plans with a liberal consideration for the future as well as the existing necessities. *Id.*
5. **RAILROAD CROSSING TRACK OF ANOTHER — PENNSYLVANIA ACT OF 1871.**
— Railroad crossing, within the meaning of the Pennsylvania act of 1871, is such a crossing only as appropriates no part of the land of the company whose track is to be crossed to the exclusive use of the company seeking to cross; and therefore the equitable powers of the court of common pleas, as conferred by the second section of that act, cannot be invoked where the primary object of a railroad company is to appropriate the land of another company, the crossing of the tracks being a mere incident. *Appeal of Sharon R'y Co.*, 133.
6. **RIGHT OF ONE RAILROAD COMPANY TO TAKE LANDS OF ANOTHER. —**
To justify the taking by one railroad company, for the same use, under the right of eminent domain, of land acquired by another company, which is necessary for the latter to economically and expeditiously carry on its present and prospective business, there must be a necessity so absolute that, without it, the grant itself would be defeated, and not a necessity created by the company itself for its own convenience, or for the sake of economy. *Id.*
7. **LAND-OWNER HAS, WITHOUT CONTRACT, NO RIGHT OF PROPERTY IN RAILROAD EMBANKMENT,** nor any right to compel the railway company to maintain such embankment as part of a levee built to protect his lands from overflow, and if a part of such embankment is carried away by a flood, and the company builds a bridge over the opening instead of repairing the break, and then files its petition for condemnation of lands required for the construction and operation of its road built on the plan adopted by the change, the land-owner cannot recover for loss resulting to him from the removal of the embankment built by the company. *Wabash, St. Louis, and Pacific R. R. Co. v. McDougall*, 539.
8. **INCREASED OR ADDITIONAL INJURY CAUSED BY ALTERATION IS MEASURE OF DAMAGES** to land-owner for land not taken, but injured, in a proceeding for reassessment of damages, where a railroad company makes a change in the plan of constructing its road after it has been built. *Id.*
9. **MEASURE OF DAMAGES IN ORIGINAL PROCEEDINGS TO CONDEMN LAND FOR RAILROAD** is the difference between the value of the land as a whole before and after the construction of the road built according to the plan proposed. *Id.*
10. **OWNER OF LAND TAKEN FOR RAILROAD MAY DEMAND NEW ASSESSMENT** as to increased damages, if, after his damages have been assessed, a change is made in the plan of construction of the road involving more damages to his land. *Id.*
11. **BENEFITS TO PART OF TRACT OF LAND INJURED BY CHANGE OF PLAN** of construction of a railroad must be considered in reduction of damages for injury to another part of the tract. *Id.*
12. **VERDICT MAY STATE AMOUNT OF DAMAGES IN GROSS SUM,** and need not describe the lands for which damages are awarded in a proceeding to condemn land for a railroad. *Id.*

10. **INTEREST OF OWNER** — LAND-OWNER who surrenders possession of his land to a railroad company without prepayment and by express or implied acquiescence induces the company to expend money in constructing its road on the street in front of his land, cannot afterwards maintain ejectment and recover his land. His recovery is confined to damages and compensation on account of the location and construction of the road. *Louisville, New Albany, and Chicago R'y Co. v. Solomon*, 852.

14. **EVIDENCE OF INJURY TO PROPERTY, WHEN INADMISSIBLE IN CONDEMNATION PROCEEDINGS** — In a proceeding for the assessment of damages to land damaged, but not taken, by a change in the construction of a railroad by the erection of a bridge over an opening in an embankment, which had been made by a flood, evidence that by reason of such opening a house of the defendant was carried off by the water, and a levee built by him was destroyed, is calculated to lead the jury to believe that such injuries were proper elements of damages to be considered by them in framing their verdict, and should therefore be excluded. If the sole object of introducing such evidence is to illustrate the force with which the water passed through the opening, it should be so limited when offered. *Wabash, St. Louis, and Pacific R'y Co. v. McDougall*, 529.

See ATTORNEY AND CLIENT; EVIDENCE, 14.

EQUITY.

1. **ACTION WILL BE REGARDED AS ONE IN EQUITY BY THE BENEFICIAL OWNER AGAINST CLAIMANTS IN POSSESSION FOR THE RECOVERY OF LAND**, where the relief sought is to recover the same, have it sold, and the proceeds divided as directed by will, which cannot be done until those in possession are ousted, and the beneficiaries are in court, and an issue as to the title is made, and must be determined before the land can be sold. The defendants failed to demur, but accepted the issue tendered. *Davidson v. Morrison*, 295.
2. **CANCELLATION OF INSTRUMENTS VOID AT LAW — PROMISSORY NOTE** — The cancellation of a promissory note of the plaintiff in the hands of the defendant, and shown to be without validity, and to have been wrongfully procured, will be decreed by a court of equity, although the plaintiff had a complete remedy at law against the collection of the note. *Flemming v. Mosier*, 854.
3. **EQUITABLE JURISDICTION — CANCELLATION** — To exclude the equitable jurisdiction, the legal remedy must be, in all respects, as satisfactory as the relief furnished by a court of equity. *Id.*

See LIMITATIONS, 3, 4; NEGOTIABLE INSTRUMENTS, 6.

ESTOPPEL.

1. **EQUITABLE ESTOPPEL IS ONLY CALLED INTO EXISTENCE FOR THE PREVENTION OF WRONG** and the redress of injury. There must be some element of wrong in the action of the party creating it. He must know, or have sufficient reason to believe, that another will place himself in a different position, or subject himself to additional injury in consequence of the action or representation. *Wheaton v. North British and M. Ins. Co.*, 216.
2. **WAIVER — THERE CAN BE NO ESTOPPEL WHEN THE FACTS ARE UNKNOWN** — No one can be presumed to have waived that the existence of which he has not known. *Id.*

3. DOCTRINE OF ESTOPPEL IN PALS IS NEVER APPLIED TO ONE WHO IS WITHOUT FAULT, or who has not by some act or declaration, or by silence when he should speak, induced another to alter his condition on the faith of such acts or the truth of such declarations. The facts which give rise to an estoppel must be such as to make it unjust and inequitable to allow the party estopped to assert what would otherwise be his right, or make proof of matters tending to establish such right. *Gillett v. Wiley*, 587.
 4. TO CREATE ESTOPPEL, THERE NEED NOT BE ACTUAL FRAUDULENT INTENT at the time of making the declarations, or performing the acts upon which the other party has relied, but it is essential that there should be voluntary acts or declarations by which another is made to believe in the existence of certain facts, and which induce him to act upon that belief. *Id.*
- See ATTACHMENT, 12, 13; CARRIERS, 11; CORPORATIONS, 9; GUARDIAN AND WARD, 6; INSURANCE, 15, 16; PLEADING, 2.

EVIDENCE.

1. EVIDENCE OF HANDWRITING, founded on a comparison with other writings admitted or proved to be genuine, is inadmissible, nor should the jury be allowed to make such comparison. *Fuller v. Fox*, 27.
2. ESTIMATES OR OPINIONS OF WITNESSES WHO SAW DÉBRIS AND ASHES AFTER FIRE, based upon what they saw, of the quantity of goods lost by the fire, are inadmissible in evidence in an action on a policy of insurance to recover the amount of the loss. Apart from the fact that these opinions are based upon *data* too uncertain and equivocal to be of any value, such a case is not one that properly admits of expert evidence. *Birmingham Fire Ins. Co. v. Pulver*, 598.
3. IN ACTION FOR DAMAGES FOR PERSONAL INJURY CAUSED BY DEPRESSION IN STREET, EVIDENCE OF MEASUREMENTS of the depression, made some time after the accident, should not be excluded as incompetent on the ground that it did not appear that its condition then was the same as at the time of the accident, where the witnesses made such comparisons of its condition at the different times as afforded some *data* by which to determine its depth at the time of the accident. *Nesbit v. Town of Garner*, 486.
4. AN OPINION AS TO RATE OF SPEED AT WHICH A HAND-CAR WAS MOVING on a specified occasion may be given in evidence by a man who has managed hand-cars or assisted in managing them. *Evansville and Terre Haute R. R. Co. v. Crist*, 865.
5. UNDER PROPER ALLEGATIONS IN THE COMPLAINT, a plaintiff may prove the nature and extent of injuries received. *Id.*
6. A PHYSICIAN, SPEAKING AS AN EXPERT, may testify as to the effect of an injury. *Id.*
7. ANCIENT DEEDS MAY NOT BE READ AS EVIDENCE AGAINST AN ADVERSE CLAIMANT IN POSSESSION, with his title of record to establish, on the part of the plaintiff, a right of entry, where no possession prior to the execution of the deed under the same chain of title, or since its execution, has been shown. *Davidson v. Morrison*, 295.
8. ENTRIES IN BANK-BOOKS CONCERNING DISCOUNT AND RENEWAL OF NOTE ARE ADMISSIBLE in evidence, after proof of their genuineness and of the death of the person who made them, for the purpose of showing the relations of the parties thereto to the transaction in respect to which the note was given. *Reynolds v. Sumner*, 523.

9. **DECLARATIONS OF A DECEDENT MADE IMMEDIATELY** after he was injured, and substantially while he was being extricated from under the wheels of the car which had passed over him, will be admitted in evidence as part of the *res gestæ*. *Louisville, New Albany, and Chicago R'y Co. v. Buck*, 883.
 10. **WITNESS. — RIGHT TO TESTIFY REGARDING MATTERS OCCURRING DURING THE LIFETIME OF A DECEDENT**, although in certain cases prohibited by statute where an executor or administrator is a party, is yet allowed in a replevin suit against a purchaser from the administrator at public sale. *Durham v. Shannon*, 860.
 11. **DECLARATIONS BY DECEDENT, TWO DAYS BEFORE HIS PURCHASE OF A HORSE**, that he intended purchasing a colt for plaintiff, admitted as substantially coincident with the act of purchasing, and declarations by decedent after the purchase, and while still in possession of the horse, and in disparagement of his title, are receivable as part of the *res gestæ*. *Id.*
 12. **AN OBJECTION TO EVIDENCE** as being "incompetent, immaterial, and irrelevant" is not sufficiently specific. *Stringer v. Frost*, 875.
 13. **FACT THAT PLAINTIFF, IN ACTION FOR PERSONAL INJURY, CONTRADICTED HIS TESTIMONY** given on a former trial in a material point affects only his credibility as a witness, and is a proper matter for the consideration of the jury, after hearing his explanation of the contradiction. *Henry v. Sioux City and Pacific R'y Co.*, 457.
 14. **ON QUESTION NOT IN ISSUE INADMISSIBLE. —** Where a railway company, after changing the construction of its road from an embankment to a trestle-bridge, files its petition for a second condemnation of land, without averring therein any intended change in the construction, evidence that the opening in the embankment was not intended to be and remain permanent is inadmissible, and should be excluded. To render such evidence admissible, the company should have averred in its petition that it proposed to readopt the original plan of construction, and supported such averment by introducing plans to be incorporated into the record. *Wabash etc. R'y Co. v. McDougall*, 539.
- See **AGENCY**, 1, 3, 4, 5; **APPEAL**, 1-3, 6, 7, 9, 12; **CONSPIRACY**; **CRIMINAL LAW**, 11, 12; **DEEDS**, 3; **EMINENT DOMAIN**, 14; **HUSBAND AND WIFE**, 8; **MASTER AND SERVANT**, 18.

EXECUTIONS.

1. **WHERE OFFICER HAS LEVIED** upon and has possession of goods, he has a special property therein for the purpose of selling and applying the proceeds to the payment of the judgment specified in the executions levied, and the remainder to the satisfaction of any other executions properly in his hands, even though not actually levied. *Penland v. Leatherwood*, 38.
2. **WHERE OFFICER HAS LEVIED HIS EXECUTION** against property, and has taken it into possession, other officers having like executions may make other constructive levies upon the same property, and though not entitled to its possession, they are entitled to have the property, or the proceeds of the sale thereof, applied to the satisfaction of their executions in their order, after the execution first levied has been satisfied; and it is the duty of the officer making the first levy, and having notice of the second and other constructive levies, to thus apply the property and the proceeds of the sale thereof. *Id.*

3. **WHERE OFFICER HAS PROPERTY** in his hands under an execution levied upon it, and he is wrongfully deprived of such possession, the measure of damages against the wrong-doer is the money due upon the execution levied and that due upon executions in his hands not actually levied, including costs, at the time of the wrongful taking. *Id.*
4. **DORMANT EXECUTION. — AGREEMENT TO POSTPONE THE ISSUE OF AN EXECUTION**, or directions to a sheriff to hold an execution until further orders, will not prejudice the rights of the plaintiff, if he has a judgment lien, and makes his sale before such lien expires. *Slattery v. Jones*, 344.

EXECUTORS AND ADMINISTRATORS.

1. **DEVASTAVIT.** — An administrator, whether domestic or foreign, who finds when he qualifies as such a sum of money to the credit of the estate, deposited in a solvent bank in the state of his residence, and who adds to such sum as payments are made him, but who also pays out the money so deposited as soon as those entitled to it will receive it, is not guilty of a *devastavit*, in case the bank fails. *Moore v. Ewre*, 17.
2. **ARE ONLY REQUIRED TO EXERCISE ORDINARY CARE AND REASONABLE DILIGENCE** in managing the estate they represent. *Id.*
3. **FIDUCIARY RELATION — EXECUTOR AND WIDOW — RELEASE — BURDEN OF PROOF.** — Burden of proof is upon executor to show the fairness and good faith of the transaction by which he procured a release from the testator's widow, who was omitted from the will, of her statutory interest in the estate, because of the relation of trust and confidence which the executor occupies towards the widow, and especially when it appears that the executor procured the release immediately after the testator's death for a consideration less than one half of the widow's interest in the personalty alone, the value of the realty besides being upwards of ten thousand dollars. *Appeal of Cunningham*, 121.
4. **FUNERAL EXPENSES OF A DECEDENT INCLUDE A TOMBSTONE ERECTED OVER HIS GRAVE.** The court having jurisdiction over the settlement of his estate may therefore allow as part of his "funeral expenses" moneys expended by the administrator in erecting a monument. *Van Emon v. Superior Court*, 258.

FISHERY.

See **WATERCOURSES**, 1, 2.

FORCIBLE ENTRY AND DETAINER.

1. **CONFESSION OF JUDGMENT UPON WARRANT OF ATTORNEY IN ACTION OF FORCIBLE ENTRY AND DETAINER** is not authorized under the law of Illinois. In this action, which is a special statutory proceeding, summary in its nature, and in derogation of the common law, the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be *coram non judice* and void. *French v. Miller*, 651.
2. **COURT OF RECORD DERIVES ITS AUTHORITY WHOLLY FROM STATUTE IN FORCIBLE DETAINER PROCEEDING**, and does not proceed therein by virtue of its power as a court of general jurisdiction. In such proceeding, it is to be treated as a court of special and limited jurisdiction, and a confession of judgment upon a warrant of attorney in it is as irregular and unauthorized as it would be in a justice's court. *Id.*

See **CONTRACTS**, 3.

1. **FALSE ENTRY—CONFLICT OF LAWS.**—Where the officers of a national bank forge a note, and enter it on the books of the bank as assets, with intent to mislead and deceive the bank examiner, the state court of North Carolina has jurisdiction to try and punish the makers for the forgery, though the federal courts have exclusive jurisdiction to punish them for making the false entries. The forgery and false entries are distinct crimes. *State v. Cross*, 53.
2. **CONFLICT OF LAWS.**—The Revised Statutes of the United States, section 5418, providing punishment for the forgery of certain writings for the purpose of defrauding the United States, is directed against frauds attempted to be perpetrated against the government in its fiscal operations, and does not include the forgery of notes or money securities held by banks or individuals against other business corporations or individuals, nor does it include a note forged by the officers of a national bank to deceive the bank examiner, so as to oust the state courts of jurisdiction to punish the forgery, when it does not appear that the government has any pecuniary interest in the matter, and in the absence of an averment that such note was forged with intent to defraud the United States. *Id.*
3. **EVIDENCE.**—Where forgery is charged against the officers of a bank in falsely uttering bonds and depositing them as assets of the bank, evidence of the financial condition or ownership of the stock of the bank at or prior to the forgery, or of family relations between the parties, is incompetent and insufficient, as the only inquiry is as to the perpetration of the forgery and an intent to defraud. *Id.*
4. **ALLEGING INTENT.**—In charging forgery under section 1191, North Carolina code, it is only necessary to allege an intent to defraud, without designating the person or corporation intended to be defrauded. *Id.*
5. **WHERE THERE IS A PRESENT INTENT TO DEFRAUD,** the crime of forgery is complete, whether the expected advantage is to accrue from it to defendant personally or to another, and whether that purpose is successfully attained or not. *Id.*
6. **INSTRUCTION** that finding the forged note among the assets of the bank, after the departure of the defendant charged with its forgery, is not a finding that defendant had had possession, and warranted no inference that he knew of, was guilty of, or was in any way connected with, the making of the note, is properly refused, when not authorized by the evidence. *Id.*
7. **EVIDENCE OF INTENT.**—Where the forged paper is such that it might, from its nature, and the course of business, deceive or mislead, to the prejudice of another person, the crime is complete; hence, where the intent to defraud is disclosed by the forged note being made payable to a bank, and put in its possession, and there left when it closed as part of its assets, an instruction that if there was no such resemblance between the genuine and spurious handwriting in the note as would deceive a man of ordinary intelligence and caution, and for want of similarity in the signatures the note "did not have any legal adaptation to accomplish a legal wrong," the accused could not be convicted, is properly refused. *Id.*
8. **EVIDENCE OF NAME FORGED.**—Where the writing alleged to be forged has the names of two or more attached thereto, it is sufficient to support a conviction if one of them is proved to have been forged. *Id.*

9. **VARIANCE.** — **INDICTMENT** for forging certain writings, referred to as "discharges for money," and purporting to be bills rendered against a town by sundry persons for services rendered or articles furnished by such person to such town, is supported by evidence showing that the defendant forged such papers, and presented them merely as vouchers for money which he claimed to have expended for the benefit of the town, without any express authority, and that such claims were allowed him by the disbursing officers of the town. *Commonwealth v. Brown*, 738.
10. **INTENT TO DEFRAUD**, which is essential to the crime of forgery, may relate to a party not named in the instrument. *Id.*

FRAUD.

1. **INNOCENT PERSON CANNOT AVAIL HIMSELF OF AN ADVANTAGE OBTAINED BY THE FRAUD OF ANOTHER** unless there is some consideration moving from himself. *Atlantic Mills v. Indian Orchard Mills*, 698.
2. **IN ACTIONS OF DECEIT, THE CHARGE OF FRAUDULENT INTENT IS MAINTAINED** by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud exists in stating that the party knows the thing to exist when he does not know it to exist, and if he does not know it to exist, he must ordinarily be deemed to know that he does not. *Chatham Furnace Company v. Moffatt*, 727.
3. **FALSE REPRESENTATIONS.** — **DEFENDANT WHO REPRESENTS THAT A CERTAIN ORE-BED IS WITHIN THE LIMITS OF A MINE**, the lease of which he is seeking to sell, is liable to a purchaser who has acted upon such representations if it appears that the only reason defendant had for his representations was a plan of a survey of the mine, in which a certain line dividing the mine from another, was, at the suggestion of the defendant and without verification, assumed to run in a particular direction, which would include the ore-bed, when in fact it ran in a different direction, and one which left the ore-bed outside the mine, concerning which the representation was made. *Id.*

See **CONTRACTS**, 5; **CORPORATIONS**, 1, 11; **ESTOPPEL**, 4; **GUARDIAN AND WARD**, 1; **LIMITATIONS**, 2; **MARRIAGE AND DIVORCE**, 1.

FRAUDULENT CONVEYANCES.

1. **TRANSFER OF PROPERTY, MADE BY HUSBAND TO DELAY, HINDER, AND DEFRAUD HIS WIFE** in the assertion of her claim to a separate maintenance, is within the Illinois statute of frauds and perjuries, which makes void every gift, grant, conveyance, assignment, or transfer of or charge upon any estate, real or personal, made with the intent to disturb, delay, hinder, or defraud creditors or other persons. *Tyler v. Tyler*, 642.
2. **TRANSFER OF PROPERTY WHICH ATTEMPTS TO SECURE TO TRANSFERREES USE OF PROPERTY** thereby transferred, to the exclusion of creditors or others having claims upon him, is fraudulent on its face. *Id.*
3. **PARTY OSTENSIBLY BOUND BY FRAUDULENT INSTRUMENT MAY GO BEHIND ITS LANGUAGE**, and show that the real purpose of its execution was to hinder, delay, and defraud creditors, in violation of the statute of frauds and perjuries, in a suit brought against him for its enforcement. *Id.*

where the fraudulent grantee or assignee, without the knowledge of any one other than the fraudulent grantor or assignor, executes a writing declaring the trust and hands it to the fraudulent grantor or assignor, who thereafter keeps it secretly in his own possession. *Id.*

5. PARTIES TO FRAUDULENT CONVEYANCE OR ASSIGNMENT MAY MAKE NEW AND INDEPENDENT AGREEMENT, for a sufficient valuable consideration, whereby the grantee or assignee may be obligated to hold the property in trust for the grantor or assignor; but such agreement must be open and notorious, and made in good faith, otherwise it will be but attempting to create anew a secret trust already condemned by the statute. *Id.*
6. STATEMENTS OF FRAUDULENT GRANTOR, MADE TO GRANTEE'S ATTORNEY, regarding the former's purpose in making the conveyances and assignments of his property, are not privileged, as against such grantor, but are admissible in evidence in favor of the grantee in a suit brought against him by the grantor for a reconveyance. *Id.*

GIFTS.

1. IN EVERY VALID GIFT A PRESENT TITLE MUST VEST IN THE DONEE, irrevocable in case of a gift *inter vivos*, revocable only upon the recovery of the donor in case of a gift *causa mortis*. *Appeal of Walsh*, 83.
2. IF ANYTHING REMAINS FOR DONOR TO DO before title of donee is complete, in either gifts *inter vivos* or *causa mortis*, the donor may decline further performance, and resume his own. *Id.*
3. COURT OF EQUITY WILL NOT COMPEL DONOR'S PERSONAL REPRESENTATIVES TO COMPLETE imperfect gift by the doing of an act which the donor, if living, might have refused to do. *Id.*
4. DONATIO CAUSA MORTIS—SAVINGS BANK BOOK.—The delivery of a savings bank book to a third person by a depositor, in expectation of death, saying, "The money there is for my sister in Ireland; but if I don't die, I want it back," does not constitute a valid *donatio causa mortis*. *Id.*

GUARDIAN AND WARD.

1. ORDER OF COUNTY COURT REQUIRING GUARDIAN TO PAY OVER TO HIS WARD MONEY IN HIS HANDS IS CONCLUSIVE upon the guardian and his security upon his bond, except for fraud or mistake, as to the amount of money then actually in the hands of the guardian. *Gillett v. Wiley*, 587.
2. RECEIPT GIVEN BY WARD TO HIS GUARDIAN IS PRIMA FACIE EVIDENCE that the latter paid to him the sum named in it, on or before its date, but is not conclusive. Like any other receipt, it is open to explanation or contradiction. *Id.*
3. LIABILITY OF SURETY ON GUARDIAN'S BOND IS FIXED by proof that the guardian never paid over to his ward the sum which the court ordered him to pay over, or any part of it, and that there had never been any settlement between the guardian and ward, unless the surety can show something which exonerates him, or which in equity will defeat the right of the ward to the relief sought. *Id.*
4. GUARDIAN OWES HIS WARD DUTY WHICH CAN BE DISCHARGED ONLY BY PERFORMANCE of the condition of his bond, and no one except the ward has power to release the obligation of his guardian or the latter's surety. *Id.*

5. **MERE ORDER OF COUNTY COURT WILL NOT RELEASE GUARDIAN FROM OBLIGATION** to account to his ward where such order is obtained, without notice to the ward, and by a receipt procured by fraud and circumvention, and if the guardian be not thereby released, neither will his surety be released. Before the county court can enter an order discharging a guardian it must appear to it that he has complied with its order requiring him to pay over to his ward all money in his hands belonging to the ward. *Id.*
6. **WARD, WHEN NOT ESTOPPED BY RECEIPT TO HIS GUARDIAN.** — Where a ward, after attaining his majority, is fraudulently induced by his guardian to sign a receipt in full, upon the false assurance that he was signing a promissory note, upon which receipt the guardian procures an order of final discharge, without notice to the ward, and without having paid over any of the money due from him to the ward, he is not thereby estopped from showing that he had not been paid, or from asserting his right against the guardian's surety, although the latter, after the guardian's release, and relying on it, released a mortgage taken by him from the guardian for his indemnity. The ward, in such a case, having no knowledge of who was surety, or that the surety had taken a mortgage from the guardian, owed no duty to the surety. *Gillett v. Wiley*, 587.
7. **WARD NOT GUILTY OF NEGLIGENCE IN SIGNING RECEIPT FOR HIS GUARDIAN, WHEN.** — Where a ward, reared in ignorance, and allowed to fall into vicious habits, and for several years afflicted with a nervous disease which had impaired to some degree his mental faculties, is, a short time after he attains his majority, waked out of sleep by his guardian, in whom he had every confidence, and in whose family he still continued to reside, and fraudulently induced to sign a receipt in full to his guardian, upon the latter's assurance that the paper presented to him for his signature was a promissory note, he cannot be regarded as guilty of negligence, although he affixed his mark to the paper without reading it, or making himself acquainted with its contents. *Id.*
8. **COURTS WATCH WITH GREAT JEALOUSY SETTLEMENTS OF GUARDIANS** with their wards, or any act or transaction between them affecting the estate of the ward. From the confidential relations between them, it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them prejudicially affecting the interests of the ward will be held to be constructively fraudulent. *Id.*
9. **PRESUMPTION OF GUARDIAN'S INFLUENCE AND WARD'S DEPENDENCE CONTINUES** after the legal condition of guardianship has ended, and transactions between them, during the continuance of the presumed influence of the guardian, will be set aside, unless shown to have been the deliberate act of the ward after full knowledge of his rights. To bind the ward, it must appear that he acted after the termination of his disability with deliberation and with full knowledge of all material facts. *Id.*
10. **SURETY OF GUARDIAN UNDERTAKES THAT HIS PRINCIPAL WILL FAITHFULLY PERFORM HIS DUTY** in respect to the money that comes into his hands belonging to his ward. He is presumed to know that an order of court discharging the guardian may be set aside for fraud, or any infirmity, in the dealings between the guardian and ward, and when by the exercise of reasonable care and diligence he could have ascertained the fact, he will be held to know of such infirmity. *Id.*
11. **RECORD OF DISCHARGE OF GUARDIAN, PROCURED BY HIS FRAUD, WILL NOT PROTECT** the surety on his bond, where the latter, having the means of ascertaining the truth, neglects to employ such means. *Id.*

DISCHARGE ON — WRIT OF ERROR PROSECUTED BY STATE. — Writ of error will not lie in behalf of the state to review an order or judgment of a court of competent jurisdiction, in *habeas corpus* proceedings, discharging from custody a person convicted and imprisoned for crime; and it is immaterial whether such court issued the writ of *habeas corpus* in the first instance, or adjudicated the matter on *certiorari* to a court commissioner who issued the writ. *State v. Grottkau*, 818.

HIGHWAYS.

1. **NEGLIGENCE — PLEADING.** — IN AN ACTION FOR DAMAGES AGAINST A RAILROAD COMPANY FOR INJURIES SUSTAINED BY A PARTY LAWFULLY USING A PUBLIC HIGHWAY, which the railroad company had unlawfully and negligently left in an unsafe condition, a general averment that there was no fault or negligence on the part of the plaintiff makes the complaint good upon the question of contributory negligence, unless the facts specifically pleaded clearly show that the plaintiff was negligent. *Evansville and Terre Haute Railroad Company v. Crist*, 865.
2. **A PERSON IS NOT COMPELLED TO EXERCISE MORE THAN ORDINARY CARE WHEN RIDING UPON A HIGHWAY** which served as the only way of ingress and egress from her home, and which had been unlawfully and negligently left in an unsafe condition by the company against which the action was brought. *Id.*
3. **RESTORING TO FORMER CONDITION.** — THE RIGHT OF A RAILROAD COMPANY TO INTERFERE WITH A HIGHWAY is coupled with the duty to make it as safe as it was before it was disturbed, or at least to use reasonable care and skill to do so. Any one unlawfully interfering with a highway creates a nuisance, and is liable in damages to one who suffers a special injury. *Id.*
4. **NEGLIGENCE — LIABILITY OF INFANT.** — AN INFANT WILL BE LIABLE FOR DAMAGES for negligently riding his horse upon and injuring a foot-passenger who is crossing a public street and neglecting no reasonable precaution which would have prevented the collision. *Stringer v. Frost*, 875.
5. **FOOT-PASSENGER CROSSING**, or about to cross, a public street should look and take precautions according to the character of the thoroughfare, so as to avoid collision with approaching horsemen or vehicles; but the same degree of care is not required as at railroad crossings. *Id.*
6. **THE RIGHTS OF FOOT-PASSENGERS IN THE PUBLIC STREETS** are equal with those of persons mounted on horseback or driving in carriages. *Id.*
7. **EVIDENCE AS TO THE AMOUNT OF TRAVEL UPON A PUBLIC STREET** over which defendant was riding will be admitted as tending to show the impropriety of the defendant's conduct in riding at an immoderate rate of speed. *Id.*

See CARRIERS, 2; MUNICIPAL CORPORATIONS, 10-12.

HOMESTEAD.

1. **A LOT MAY PROPERLY BE INCLUDED IN A DECLARATION OF HOMESTEAD** when it adjoins the lot on which the dwelling of the claimants stands, and is used for a garden by the family, and has thereon a well also used by them. The fact that the garden is not cultivated during the year in which a levy of execution is made is a circumstance entitled to but little weight. *Arendt v. Mace*, 207.

2. **MAY BE DECLARED ON REALTY, A PART OF WHICH IS COMMUNITY PROPERTY AND THE BALANCE** of which is the separate property of the wife, if the declaration is made and filed by her. *Id.*
3. **HUSBAND, AS HEAD OF FAMILY,** may have a homestead exempt from execution in a life estate, or in property the title to which is in his wife. *Kendall v. Powers*, 328.
4. **CONVEYANCE OF.** — While a party holds property exempt from sale under execution as a homestead, he may sell his interest therein; and the purchaser will take whatever title he has, free from any claim of a judgment creditor. *Id.*
5. **WHEN ACQUIRED, WILL BE PRESUMED TO CONTINUE** until the contrary appears, the burden of proof in this respect being upon the general creditor. *Boot v. Brewster*, 515.
6. **PERMANENT ABANDONMENT OF HOMESTEAD SHOULD NOT BE INFERRED,** when it appears that the claimant left the premises with his family for the purpose of earning a living; that some furniture was left in the house, and never removed by him; that the premises were so rented that the lessee was a tenant at will; that a homestead was not acquired elsewhere, and the claimant testified that he always intended to return. The long duration of his absence, though entitled to consideration, is not conclusive, under the circumstances, of the fact of abandonment. *Id.*
7. **EVIDENCE.** — **WHEN JUDGMENT IS OBTAINED AGAINST DEBTOR WHILE IN OCCUPANCY OF HOMESTEAD, PROOF OF INTENT** to abandon the homestead should be clearer and more satisfactory than when the lien relied on was obtained after the homestead had ceased to be actually occupied as such. *Id.*
8. **VALUE.** — **IOWA CODE, SECTION 1996, LIMITS HOMESTEAD IN TOWN PLAT** to one half acre, unless the value is less than five hundred dollars, but the claimant's own testimony that he offered to take four hundred and fifty dollars for the homestead in controversy, which was an acre in extent, and in a town plat, was held sufficient, in the absence of all other evidence, to establish such value. *Id.*

HOMICIDE.

1. **EVIDENCE — DECLARATIONS.** — Where in a murder trial it appears that the accused and his brother went to the house of the deceased, and waited for him to come home, that while waiting, the brothers sharpened their knives, and while so engaged, one of them declared that "somebody will be surprised to-night," whereupon the accused repeated the remark, such declaration is competent to go to the jury, on the ground that it was made shortly before the homicide, was a part of the conversation, and that the response of the accused made it his own declaration. *State v. Ellis*, 49.
2. **INSTRUCTIONS.** — Where on a trial for murder the court has instructed the jury as to manslaughter and self-defense, it is not error to charge that if the provocation was slight, and the accused used excessive force out of all proportion to the provocation, the killing would be murder, though there was no previously formed design to kill, especially where the immediate circumstances attending the killing is called to the attention of the jury, and the most exculpatory parts thereof are rendered nugatory by the conduct of the accused after the killing, showing absolute want of concern for the deceased after the death blow was inflicted. *Id.*

1. **WHILE PARTIES LIVE TOGETHER AS HUSBAND AND WIFE, NO IMPLIED PROMISE CAN ARISE** that the one will pay for work done by the other. *Cooper v. Cooper*, 721.
2. **WOMAN DECEIVED INTO THE BELIEF THAT SHE IS MARRIED CANNOT SUSTAIN AN ACTION FOR SERVICES** rendered by her as housekeeper for her supposed husband while living with him as his wife, and in ignorance that her marriage to him was void because the wife of a prior marriage was still living. If she has any remedy, it is by an action for the deceit in inducing her to marry by false representations or by false promises. *Id.*
3. **DEED DIRECTLY FROM HUSBAND TO WIFE, or from the latter to the former, vests the equitable title in her or him in equity, though such deed is void at law.** *Turner v. Shaw*, 319.
4. **DEED DIRECTLY FROM HUSBAND TO WIFE, with an habendum clause to have and to hold to her sole use and benefit, vests an equitable separate estate in her as against him, though a different result might have been reached had the deed been made by a stranger.** *Id.*
5. **WIFE'S SEPARATE ESTATE, CONVEYANCE OF.** — Wife has absolute ownership of, and may convey or encumber, her equitable separate estate without her husband joining her in the conveyance. *Id.*
6. **WHERE WIFE HAS CONVEYED HER EQUITABLE SEPARATE ESTATE to her husband, he may dispose of it by will as he sees fit.** *Id.*
7. **SALE OF WIFE'S LAND — PAYMENT.** — Where the husband sells the wife's land under authority from her, and accepts his notes and the worthless note of a third person in part payment therefor, the acceptance of the notes instead of money cannot be regarded as payment, in the absence of evidence showing authority on the part of the husband to receive payment in such manner, or that the wife subsequently ratified his acts; and in an action by the wife to recover the price, the burden of proof is on the purchaser to show such authority in the husband or such ratification by the wife. *Rexyon v. Snell*, 839.
8. **EVIDENCE. — ADMISSIONS MADE BY HUSBAND ARE NOT ADMISSIBLE as evidence against his wife, there being no pretense that when he made them he was acting for her, although he has acted generally as her agent in the management, care, and disposition of her property.** *May v. Sterdiant*, 463.

See FRAUDULENT CONVEYANCES, 1.

INDICTMENT.

See JURY AND JURORS, 6.

INJUNCTIONS.

WILL ISSUE TO PREVENT THE MAKING AND CARRYING OF BANNERS IN FRONT OF COMPLAINANT'S PLACE OF BUSINESS for the purpose of preventing workmen from entering into or continuing in his employ. *Sherry v. Perkins*, 689.

See CONTRACTS, 7; CORPORATIONS, 2; TRADE-MARKS, 3.

INSTRUCTIONS.

1. **MAY BE REFUSED AFTER THE ARGUMENT HAS BEEN BEGUN.** *Esmondville and Terre Haute R. R. Co. v. Crist*, 865.

2. "REASONABLE CARE AND DILIGENCE" need not be defined in an instruction where the term is necessarily used, in the absence of a request that it be defined. *Johnson v. Missouri Pacific R'y Co.*, 351.
3. REFUSAL TO GIVE INSTRUCTION SUBSTANCE OF WHICH HAS BEEN GIVEN in other instructions is not erroneous. *Perin v. Parker*, 571.
4. PARTY CANNOT COMPLAIN OF INSTRUCTION MORE FAVORABLE THAN HE HAD RIGHT to ask for. *Birmingham Fire Ins. Co. v. Pulver*, 598.
5. INSTRUCTIONS TO JURY WHICH FAIRLY AND CLEARLY STATE EVERY MATERIAL POINT having a direct bearing upon the issues in the case, are sufficient, although they omit several propositions in instructions asked which bear merely upon collateral matters, and consisting of lectures to the jury upon the proper method of discharging their duties, or cautions against prejudice and favoritism. The giving of instructions of this character is very much within the discretion of the court, and if, in his opinion, they are not necessary to a due administration of justice, his refusal to give them cannot ordinarily be assigned for error. *Id.*
6. COURT MAY PREPARE HIS OWN CHARGE TO JURY, and is not limited to instructions submitted by counsel. *Id.*
7. APPEALS. — CAUSE WILL NOT BE REVERSED BY APPELLATE COURT BECAUSE OF ERRONEOUS INSTRUCTION from which no prejudice could result, but where the jury find generally for the defendant on all the issues, and the court erred in the instruction, unfavorably to the plaintiff as to one of them, and it cannot be determined that the jury did not act under such instruction in finding their verdict, prejudice to the plaintiff must be presumed, and the cause will be reversed. *Hibbard v. Zenor*, 497.
8. INSTRUCTION TO JURY NOT MISLEADING. — An instruction to the jury that the delivery of a chattel mortgage to the recorder, and the stamping of it as filed by him, is not a record imparting constructive notice, and concluding, "Nor will any person be bound by the record or notice of such instrument until the proper description thereof is entered in the entry-book or index-book," is not misleading, where, in another part of the instruction, the jury were told in clear and express terms that actual notice would bind as effectually as the record would have done if made. *Id.*
9. MODIFICATION OF INSTRUCTION ERRONEOUS WHEN. — Where, notwithstanding the fact that a general charge of conspiracy in an indictment is, by a bill of particulars furnished the defendant, restricted to transactions relating to the normal school, evidence as to transactions relating to other institutions, not inseparably connected with the transactions relating to the normal school, has been admitted on the trial, it is error to strike out from an instruction asked by the defendant these words: "The defendants are not, in this case, charged with conspiring to defraud the county by bribing county commissioners to allow exorbitant and unjust bills. Neither are they upon trial for conspiracy to defraud the county in any way, in any transactions other than those relating to the repairs at the normal school." *McDonald v. People*, 547.
10. ERROR WITHOUT PREJUDICE. — Erroneous instructions against the party appealing will not work a reversal of the judgment when the proper determination is reached, notwithstanding the instructions. *Fitzgerald v. Barker*, 375.
11. IT IS ERROR TO INSTRUCT JURY IN SUCH WAY AS TO PRACTICALLY WITHDRAW OR NULLIFY CHARGE PROPERLY GIVEN as to plaintiff's contributory negligence, by a reference to a general charge, which stated

ances, and if they did not, then the jury were to determine the plaintiff's damages, but if the appliances were of an ordinary character, the verdict should be for the defendants. *Schreck v. Kehler*, 70.

See **APPEAL**, 8.

INSURANCE.

1. **CLAIM THAT BUILDING WAS WARRANTED TO BE OCCUPIED BY THE ASSURED AND HIS FAMILY** cannot be sustained when his answer to the question contained in the application, "Each story, how occupied?" is this, "Second story, by tenant as a lodging-house." *Ment v. Home Insurance Company*, 158.
2. **WHERE AGENT OF THE INSURER MAKES OUT THE APPLICATION, HAVING KNOWLEDGE OF THE FACTS**, the company cannot urge in defense of an action for losses suffered that the statements contained in such application are defective or false. *Id.*
3. **CONDITIONS OF A POLICY MUST BE TREATED AS WAIVED, WHEN, TO THE KNOWLEDGE OF THE AGENT**, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud. *Id.*
4. **CONSTRUCTION OF POLICY.** — Where the application is for insurance on a frame building and cellar, and is referred to in the policy in aid of the description, the omission from the policy of the words "the cellar" is immaterial; and the assured, in the event of a loss, is entitled to recover for the same property as though these words had been copied into the policy. *Id.*
5. **EVIDENCE OF THE DESTRUCTION OF PROPERTY OTHER THAN THAT INSURED** may be received on behalf of plaintiff, when the insurance company makes the defense that he had burned his own property. *Id.*
6. **REFORMATION OF POLICY TO CONFORM TO CONTRACT.** — The defendant's agent contracted with the plaintiff for insurance on the latter's property to the amount of three thousand dollars in several companies which the agent represented, and issued the policy in question to the plaintiff for part of that amount, containing a provision that the policy should be void if the insured should obtain additional insurance without the written consent of the company. It was clearly understood, however, that the plaintiff was to have the right to obtain additional insurance, but the required provision was omitted from the policy by mistake or oversight of the defendant's agent. In an action on the policy, it was held that the plaintiff had a right to rely on the agent's writing the policy in accordance with the contract; and because he failed to read the policy and discover the omission therein, he was not guilty of such negligence as would bar him of the right to have the policy reformed, and the omitted provision inserted. *Barnes v. Habig Insurance Co.*, 450.
7. **ACTUAL CASH VALUE OF PROPERTY IN PRIZE IT WILL BRING** in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price. There is no error in explaining in an instruction to the jury "actual cash value" as meaning "fair cash value," or in using the two phrases as practically synonymous. *Birmingham Fire Ins. Co. v. Pulver*, 598.
8. **CONDITION IN POLICY PROVIDING FOR ARBITRATION CANNOT DEPRIVE INSURED OF HIS RIGHT OF ACTION**, unless clearly made a condition precedent to the existence of such right. *Id.*

9. **EVIDENCE THAT THE AGENT OF THE INSURER IN WRITING OUT THE APPLICATION OMITTED ANSWERS** made by the applicant, or wrote the answers substantially different from those actually given, is receivable on behalf of the assured, when he did not read the application as written out, nor having any knowledge of its falsity. The rule may be otherwise when the application contains a stipulation that the insurer shall not be bound by any knowledge or information given to his or its soliciting agents. *Wheaton v. North British and Mercantile Ins. Co.*, 216.
10. **TO AVOID A POLICY FOR OVER-VALUATION**, it must appear that such over-valuation was intentional, fraudulent, and not an honest expression of opinion. This rule prevails although the policy contains this stipulation and condition: "If any false representation is made by the assured of the condition, situation, or occupancy of the property, or any over-valuation, or any misrepresentation whatever, either in a written application or otherwise, this policy is void." *Id.*
11. **WARRANTIES, WHAT ARE NOT.** — Statements in an application, though declared to be warranties, will not be given effect as such if qualified by other stipulations which show that the parties did not so regard them. *Id.*
12. **A REPRESENTATION IS CLEARLY DISTINGUISHABLE FROM A WARRANTY.** The former is part of the proceedings which propose a contract, while the latter is a part of the completed contract. The falsity of the former may render the contract voidable for fraud; but a non-compliance with the latter is an express breach of the contract. *Id.*
13. **WAIVER REQUIRED TO BE IN WRITING.** — When a policy of insurance declares that there can be no waiver except in writing indorsed on the policy, the mode enters into and becomes a part of the power; the insured has full notice when he enters into the contract that a condition cannot be waived by an agent to whom the provision as to written indorsement relates, except in the manner in the contract provided. *Id.*
14. **WAIVER, PROOFS OF LOSS.** — Clause in a policy of insurance prohibiting any waiver unless indorsed on the policy refers only to those provisions of the policy which enter into and form part of the contract of insurance, and which may properly be designated as conditions; it has no reference to those stipulations which are to be performed after a loss has occurred, — such as giving notice and furnishing preliminary proofs. *Id.*
15. **ESTOPPEL AGAINST RESISTING AN ACTION TO RECOVER UNDER AN INSURANCE POLICY DOES NOT ARISE FROM A REQUEST TO MAKE PROOF OF LOSS, and to furnish vouchers.** The action of the insured in making such proofs is referable to his contract, and the necessity of complying with it; and the request to him to make the preliminary proofs cannot be enlarged beyond its natural import, and converted into an engagement to waive any defenses to which the insurer is otherwise entitled. *Id.*
16. **ESTOPPEL.** — If no act has been done or left undone by the assured, in reliance on the action or non-action of the insurer, there can be no estoppel. An estoppel can never arise by implication alone, except by some conduct which induces action in reliance upon it to an extent which renders it a fraud to recede from what the party has been induced to expect. *Id.*
17. **WAIVER OF RIGHT TO URGE OVER-VALUATION.** — Instruction to jury, that if the agent of the insurer, after knowing that the property was over-valued in the application, requested the assured to make out pre-

numinary proofs, and present vouchers in support of his claim, and thereby put him to trouble and expense, then the right to urge such over-valuation as a defense was waived, is erroneous in this, that it omits the element of intent in the over-valuation. Not until the insurer or its agents had notice of an intentional over-valuation was it advised of any cause of resistance. Therefore, prior to such time, it could not be guilty of bad faith in advising the assured to proceed to comply with his policy by making proper proofs of loss. *Id.*

18. **COVENANT AGAINST ENCUMBRANCE** — A covenant avoiding the policy if the property insured should become encumbered by mortgage, judgment, or otherwise, without the company's consent, is broken when an encumbrance falls upon the property, whether with or without the actual knowledge of the insured. *Hench v. Agricultural Ins. Co.*, 74.
19. **SECOND INSURANCE BY ANOTHER WITHOUT RIGHT, EFFECT OF ON RIGHTS OF PRIOR POLICY HOLDER** — Where the owner of premises, after mortgaging them, takes out a policy of insurance thereon, and the mortgagee after selling the premises under a power in the mortgage and buying at his own sale, takes out another policy thereon in the same company, without the consent of the mortgagor, and a loss occurring, collects the proceeds of the policy, and the mortgagor causes the sale to be set aside, and the mortgagee to be compelled to account to him for the proceeds of the policy so collected by him from the company, this will constitute no defense to a suit brought by the mortgagor against the company upon his prior policy. *Commercial Union Assurance Co. v. Scammon*, 607.
20. **CONDITIONS AGAINST ALIENATIONS IN POLICIES OF INSURANCE MUST BE STRICTLY CONSTRUED**, the court having in view the object of the insurance company in inserting them. *Id.*
21. **CONSTRUCTION OF CONDITIONS AGAINST ALIENATION IN INSURANCE POLICY** — Where in a policy of insurance on premises one clause of a condition provides that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, . . . in every such case this policy shall be void," and another clause provides that "when property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate," the latter clause will be held to have been intended to explain and qualify the meaning of the words of the former, and the sale or disposition of the property intended will be construed to be such as caused all interest of the assured in or control over the property to cease. And in such a case a sale of the property insured, which is voidable and is afterwards set aside, is not such an alienation as will avoid the policy. *Id.*
22. **TRUSTEE UNDER MORTGAGE CONTAINING POWER OF SALE CANNOT BECOME PURCHASER** at his own sale, either directly or indirectly, and if he does so become the purchaser, the rights of the mortgagor will remain precisely the same as though no sale had been made, and such a sale will not constitute an alienation within the meaning of a clause against alienation in an insurance policy. *Id.*
23. **TRUSTEE'S SALE NOT WITHIN PROHIBITION AGAINST ALIENATION IN INSURANCE POLICY, WHEN** — Where a trust deed is made of property to secure a debt, and afterwards the maker of the deed takes out a policy of insurance upon the same property, containing a clause prohibiting its alienation, and the trustee, without his consent, and against his protest,

sells the property to the *cestui que trust*, the maker of the trust deed being in possession and so remaining until after the sale, and until the property is destroyed by fire, denying the validity of the sale and asserting his right of possession and ownership, and within a reasonable time instituting proceedings to set the sale aside, the deed of the trustee is not such an alienation as is within the reasonable contemplation of the clause against alienation. *Id.*

24. **FIRE INSURANCE — MORTGAGEE TAKING OUT POLICY — STIPULATION AGAINST ADDITIONAL INSURANCE — ADDITIONAL INSURANCE OBTAINED BY ONE MORTGAGOR.** — Mortgagee is bound by the stipulations of a policy, so that the policy will be defeated by subsequent unauthorized insurance, although obtained by and insuring the interest of one of the mortgagors only, where the mortgage provided that if the mortgagors failed to insure the property, the mortgagee might insure the same, the expense thereof being added to the mortgage debt, and the mortgagee applied for insurance on the property to secure his interest therein, and a policy was issued running to the mortgagors, but providing that the loss, if any, should be payable to the mortgagee, and containing a stipulation avoiding the policy if the insured obtained additional insurance without consent of the company, and the mortgagee paid the premium, and retained the policy without objection for nearly a year before the property was burned. *Gillett v. Liverpool and London and Globe Ins. Co.*, 784.
25. **COMPANY IS BOUND TO POINT OUT DEFECTS IN PROOFS OF LOSS**, and to afford to the insured all reasonable facilities for ascertaining what they are, so that he may be able to remedy them. And its refusal to afford to the insured reasonable facilities to prepare and serve amended proofs of loss is evidence for the jury as tending to show a waiver of the defects in the proofs. *Birmingham Fire Ins. Co. v. Pulver*, 598.
26. **INTERVIEWS AND CORRESPONDENCE BETWEEN INSURED'S ATTORNEY AND AGENTS** of an insurance company are competent evidence tending to prove a waiver of alleged defects in proofs of loss in a case where, after a loss, the insured furnished proofs to which exceptions were taken, and the attorney who prepared the proofs having meantime died, and another attorney being employed by the insured to correct the proofs, the latter called upon the local agent to learn what was wrong, and what could be done to correct the proofs, and the agent promised to show him the proofs, but failed to do it, whereupon the attorney called upon the adjusting agent, who refused to let him see the proofs, and then wrote to the local agent reciting his efforts in the matter, and asking for an explanation. *Id.*
27. **INSURED IS NOT CONCLUDED BY CERTIFICATE OF MAGISTRATE AS TO AMOUNT OF LOSS** required by the policy to be furnished as part of the proofs of loss, but may, notwithstanding such certificate, establish by witnesses the true amount of the loss. By furnishing such certificate he merely complies with a condition of the policy, without admitting its accuracy or agreeing to be bound by it. *Id.*
28. **LIFE INSURANCE — BREACH OF CONDITION AGAINST USE OF ALCOHOLIC LIQUORS.** — If a certificate of insurance is issued by an order whose distinguishing feature is its requirement of daily abstinence from the use of liquors as a beverage, and if the application for such insurance contains an agreement that the assured will comply with all the laws, regulations, and requirements of the order, and the certificate a statement that it is

issued upon the express condition that the assured shall in every particular, while a member of the order, comply with all its laws, rules, and requirements, the policy becomes forfeited and void upon the assured commencing the use of alcoholic liquors as a beverage. His suspension or expulsion from the order is not a condition precedent to such forfeiture. *Hogins v. Supreme Council*, 173.

29. **LIFE INSURANCE—INSURABLE INTEREST.**—To support a contract of insurance on the life of one person in favor of another, there must be a reasonable ground, founded in the relations of the parties, either pecuniary or of blood or affinity, to expect some relief or advantage from the continuance of the life of the insured. *United Brethren Mut. Aid Soc. v. McDonald*, 111.
30. **LIFE INSURANCE—PRESUMPTION OF WAGER—JURY.**—In the absence of an insurable interest of one person in the life of another, the law will presume that the insurance was procured for the purpose of a wager or speculation, and the question is not one to be submitted to the jury. *Id.*
31. **LIFE INSURANCE—STEP-FATHER AND STEP-SON.**—A step-son has no insurable interest in the life of his step-father, where he has a separate home and family of his own, and is not a creditor nor in any way dependent upon or responsible for the support of the step-father. *Id.*
32. **PERILS OF THE SEA** are all perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such. By the Civil Code of California they are defined to be: "Storms and waves; rocks, shoals, and rapids; other obstacles, though of human origin; changes of climate; the confinement necessary at sea; animals peculiar to the sea; and all other dangers peculiar to the sea." *Miller v. California Insurance Company*, 184.
33. **BURSTING OF A BOILER IS NOT A PERIL OF THE SEA**, either as understood in the law of marine insurance, or as defined by the Civil Code of California. *Id.*
34. **MUTUAL BENEFIT ASSOCIATION MAY WAIVE FORMALITIES REQUIRED BY ITS CHARTER TO BE COMPLIED WITH IN CHANGING BENEFICIARY**, and pay the benefit to the new beneficiary, although the new direction as to its payment was not made by the assured in the mode pointed out by the organic law of the association, and notwithstanding it is a rule of the law of insurance that when a policy is issued, the right to the benefit at once vests in the beneficiary, and the assured has no power subsequently over the insurance. *Manning v. Ancient Order of United Workmen*, 270.
35. **INSURED IS NOT ESTOPPED EVEN BY HIS OWN SWORN STATEMENT IN HIS PROOF OF LOSS**, but may, in a suit on the policy, give evidence of the actual amount of his loss, and recover accordingly. *Birmingham Fire Ins. Co. v. Parker*, 508.

See EVIDENCE, 2; MUTUAL BENEFIT SOCIETIES.

INTEREST.

1. **TOWNSHIP ORDER.**—Township order will not bear interest, in Pennsylvania, although interest may be recovered, under certain circumstances, in a suit on the original indebtedness. *Township of Snyder v. Board*, 118.
2. **IS SOMETIMES ALLOWED IN AN ACTION TO RECOVER UPON UNLIQUIDATED DEMANDS**, but its allowance is not proper when the action is to recover for services, the amount, character, and value of which can only be estab-

lished by evidence in court, or by an accord between the parties, and are not susceptible of entertainment either by computation or by reference to market rates or other known standards. *Cox v. McLaughlin*, 164.

INTERPLEADER.

"SAME DEBT." — Defendants in an action for the purchase price of personal property sold have no right to interplead persons who claim to have a title to the property adverse to that of the plaintiff, under section 2610 of the Revised Statutes of Wisconsin, which provides that a defendant, against whom an action is pending upon a contract, may apply for an order substituting in his place a person, not a party to the action, who "makes against him a demand for the same debt." *Barter v. Day*, 761.

INTERVENTION.

See ATTACHMENT, 7.

INTOXICATING LIQUORS.

See CONTRACTS, 6; DEEDS, 2.

JUDGMENTS.

1. **LIEN ATTACHES TO LAND BOUGHT WITH THE DEBTOR'S MONEY**, but the title to which is taken in the name of another for the purpose of defrauding the creditors of the judgment debtor. *Slattery v. Jones*, 344.
2. **LIENS ATTACH IN THE ORDER OF THEIR RENDITION** to lands which have been transferred, or the title to which has been taken in the name of another, for the purpose of defrauding creditors, and have precedence of attachments subsequently levied. *Id.*
3. **BY AGREEMENT, AND AMENDMENT THEREOF AS AGAINST INNOCENT THIRD PARTY.** — Where a money judgment has been entered, by agreement, for damages against a railroad company for obstructing a watercourse, but the clerk, through the plaintiff's fraudulent misrepresentation, has entered such judgment together with an agreement that the company shall erect a culvert of certain dimensions, within a certain time, at such watercourse, and the judgment, as entered, has been read in open court, and signed by the judge without objection, it will not be amended by expunging all except the money judgment, on the motion of the company, two years afterwards, and as against an innocent purchaser of the land and judgment, for value and without notice. *Indiana, Bloomington, and Western R'y Co. v. Bird*, 842.
4. **AMENDMENT OF, AS AGAINST INNOCENT THIRD PARTY.** — Party guilty of negligence in allowing a fraudulent and erroneous judgment to be entered against him by agreement is not entitled to an amendment of the judgment which will operate to the injury of an innocent third party who is a purchaser and assignee for value, and without notice, and where the record does not show that any fraud has been practiced. *Id.*
5. **JURISDICTION — FORMER ADJUDICATION.** — ACTION, WHEN AIDED BY ATTACHMENT, MAY BE MAINTAINED in courts of Iowa, under section 2580 of the code, against a foreign corporation having property within the state; and the dismissal by a federal court in that state of a former action for the same cause, but not aided by attachment, on the ground that jurisdiction of the defendant had not been acquired, is no bar to the subsequent action in the state court commenced by attachment. *Weyand v. Atchison etc. R'y Co.*, 504.

See ATTACHMENT, 11; LIS PENDENS, 2; REPLEVIN.

JUDICIAL SALES.

1. **SHERIFF'S SALE — PURCHASER.** — Where, at a sheriff's sale, the purchaser is the deputy of the officer selling, but has no connection with or control over the process or the sale made under it, the sale is not void, and such purchaser may convey a good title to other innocent purchasers. *Cowles v. Hardin*, 36.
2. **SHERIFF'S SALE — FAILURE OF SHERIFF** to give the defendant in execution the statutory notice of the levy and return thereof is a mere irregularity, which the purchaser at the sale is not bound to notice, and which does not render the sale void. If the debtor suffers injury therefrom, his remedy is against the officer making the sale. *Id.*
3. **PLEADING. — AVERMENT IN PETITION TO SET ASIDE EXECUTION SALE OF LAND, THAT DEFENDANT PURCHASED** the property at the sale, and obtained a deed to it, with actual and constructive notice at the time of the plaintiff's rights is equivalent to an averment that she had paid the amount of her bid, and raises no issue as to whether the purchase was for a valuable consideration. *May v. Sturdivant*, 463.
4. **UPON FAILURE OF PURCHASER AT SHERIFF'S SALE TO PAY AMOUNT OF BID, or to make some arrangement with reference to it, satisfactory to the judgment creditor, it is the duty of the officer to disregard the bid, and again offer the property for sale.** *Id.*
5. **EXECUTION SALE. — A BID MADE AND ACCEPTED WITHOUT MORE DOES NOT ACCOMPLISH A SALE,** and the sheriff, in the exercise of the discretion vested in him, may permit the bid to be withdrawn, and may resell the property. *Maher v. Aetna Life Insurance Company*, 880.
6. **WHERE THE SHERIFF STRUCK OFF PROPERTY AT A FIGURE GREATLY UNDER ITS VALUE, BUT THE SALE NOT HAVING BEEN PERFECTED, a second sale at a much higher price was consummated, the redemption must be from the bid made on the final sale.** *Id.*

JURISDICTION.

JUDGMENT. — In order to subject particular property to the judgment of a court, the suit brought for that purpose must be brought where the res is. *Carr v. Lewis Coal Co.*, 328.

See BIGAMY; JUDGMENTS, 5.

JURY AND JURORS.

1. **NEW TRIAL.** — Where jurors after balloting without a unanimous result each agree to be bound by the result reached by the majority, and then return a verdict of conviction with two dissenting votes, but upon being polled each answers that conviction is his verdict, the latter will not be set aside and a new trial granted. *State v. Harper*, 46.
2. **NEW TRIAL.** — Verdict will not be set aside on the ground that the jury were improperly approached and spoken to about the case, when the proof offered is in a vague and indefinite form, pointing out no specific act done or words spoken to show a tampering, or that any juror was influenced thereby. *Id.*
3. **SEPARATION OF JURY.** — Verdict will not be disturbed where one juror in charge of an officer is separated from the other eleven during their deliberations, in the absence of proof of misconduct or undue influence. *Id.*
4. **THE INHABITANTS OF A TOWN ARE NOT DISQUALIFIED FROM ACTING AS JURORS** on a trial of persons accused of forging and uttering discharges

for money payable from the treasury of such town. *Commonwealth v. Brown*, 736.

5. INHABITANTS OF A MUNICIPALITY ARE COMPETENT TO ACT AS JURORS ON A TRIAL WHEN SUCH MUNICIPALITY HAS NO DIRECT PECUNIARY INTEREST, but only such interest as results from the commission of an offense against its property. This is especially true when the trial is for an offense which, under the statute, cannot be prosecuted in any other place. *Id.*
6. INDICTMENT FOUND BY A GRAND JURY, ONE OF WHOSE MEMBERS WAS IRREGULARLY DRAWN, but who possessed all the requisite qualifications, is valid. The general rule is, that mere irregularity in the proceeding by which a juror gets on the panel does not affect the validity of his action. Hence it was held that an objection to an indictment was properly overruled, where it appeared that a person's name had been ordered to be stricken from the jury list by a vote of the town, but notwithstanding this, his name was placed in the box, and was drawn by the selectmen, and returned to court, and he was sworn and acted as one of the grand jury in finding the indictment in question. *Id.*

See CRIMINAL LAW, 9; NEW TRIAL, 1, 2; VERDICT, 1, 2.

LACHES.

See TRUSTS AND TRUSTEES, 9, 13, 17.

LANDLORD AND TENANT.

TRESPASS. — Tenant in possession has the right, in the absence of proof of restrictions upon his tenancy to the contrary, to invite such persons as his business or pleasure may suggest to come upon the premises for any lawful purpose, and one so entering against the will of, and after being forbidden by, the landlord, is not guilty of willful trespass. *State v. Lawson*, 42.

LARCENY.

1. INDICTMENT FOR, MUST AVER THAT THE PROPERTY STOLEN BELONGED TO SOME PERSON other than the defendant. *People v. Hanselman*, 238.
2. CONSENT TO COMMISSION OF CRIME, which will relieve the act of its criminal character, is something different from mere passive submission without any previous understanding or preconcert with the criminal. Therefore, if a constable, for the purpose of detecting thieves, disguises himself, feigns drunkenness, and lies down in an alley in apparent stupor, where a thief finds him and takes money from his pocket, he being conscious of the act, and remaining passive in order that he might afterwards arrest and convict the thief, the act of the latter is larceny. *Id.*

LIBEL AND SLANDER.

BY A WITNESS. — AN ACTION WILL NOT LIE AGAINST A WITNESS for slanderous words uttered by him in giving his testimony, though false, prompted by malice, and not necessary to answer the question asked him. Hence it was held that no recovery could be had against a witness who, on being asked how many days intervened between two events, instead of answering that he did not remember, said: "Not knowing that a mistress or woman of Mr. Plitt's would step in and claim the lawful wife's property, I did not keep an account of the date

little particular incidences, to save Mrs. Pitt from much heartache and trouble, and cause of her death." *Henshel v. Fensell*, 412.

LIMITATIONS.

1. **NEW PROMISE BY DEBTOR TO STRANGER.**—Promise to pay a debt barred by the statute of limitations must be made to the party interested, or to his agent, to remove the bar of the statute; and evidence that the debtor stated to a stranger that he had acknowledged the indebtedness to his creditor, and promised to pay it, is not a promise made to the creditor or his agent, and is therefore insufficient to remove the bar. *Spangler v. Spangler*, 114.
2. **STATUTE BEGINS TO RUN IN CASE OF FRAUD ONLY FROM DISCOVERY** of the fraud, or from the time when it could have been discovered by the use of reasonable diligence. But the failure to use such diligence may be excused when there exists a relation of trust and confidence between the parties, rendering it the duty of the party committing the fraud to disclose to the other the truth, and where it was through the acts of the former that the latter was induced to refrain from inquiry. *Gillett v. Wiley*, 587.
3. **EQUITY ADOPTS PERIOD OF LIMITATION FIXED BY STATUTE** in enforcing the rights of a ward against the surety on his guardian's bond, unless there exists some equitable reason for adopting a different period. *Id.*
4. **ORDINARILY, COURTS OF EQUITY ADOPT TIME FIXED BY STATUTE OF LIMITATIONS** for barring claims at law in analogous cases as the period at the end of which they will conclude a recovery in equity. But this rule is not inflexible, and its application will always depend upon a consideration of the allegations and proof whether the presumption from which the bar arises prevails. The presumption arising from the mere lapse of time may be repelled by proof of other facts and circumstances inconsistent with it. *Reynolds v. Sumner*, 523.
5. **GENERAL RULE AS TO ACTIONS ARISING UPON CONTRACTS, EXPRESS OR IMPLIED**, is, that where the right of action depends upon a demand, such demand must be made within the period prescribed by the statute of limitations. A party cannot prevent the running of the statute by omitting to do some act which he might have done, or which he is required by law to do. *Reinhardt v. Marguardt*, 477.
6. **STATUTE WILL NOT BEGIN TO RUN IN FAVOR OF BAILEE** until he denies the bailment, and converts the property to his own use. *Id.*
7. **STATUTE OF MASSACHUSETTS DOES NOT RUN IN FAVOR OF ONE WHO HAS NEVER BEEN A RESIDENT** of the state, when the plaintiff is also a non-resident against whom no statute of limitations has run in the state where he resides and where the cause of action accrued, although the statute of limitations of a third state, to which the defendant has removed, protects him from suit there. *McCann v. Randall*, 866.
8. **PAYMENT.**—Where payment *sub modo* of an admitted indebtedness has in fact been made by an agent in such manner that the principal is entitled to affirm or repudiate it upon learning the facts, the statute of limitations does not begin to run until the facts are known or the payment disaffirmed. *Ranyon v. Snell*, 839.

See MORTGAGES, 5; TRUTH AND TRUSTS, 2.

LIS PENDENS.

1. **BONA FIDE PURCHASER OF PERSONAL PROPERTY.** — Where movable personal property pending litigation against it is removed from the jurisdiction where the suit is pending to another state, and there sold to a *bona fide* purchaser, the doctrine of *lis pendens* does not apply to the sale; and applying this rule, a steam-tug is not subject to the law of *lis pendens* after its removal from the state. *Carr v. Lewis Coal Co.*, 328.
2. **JUDGMENT — PURCHASER PENDENTE LITE.** — Personal judgment cannot be rendered against a mere *bona fide* purchaser *pendente lite*, although such judgment might be authorized against his fraudulent donee or grantee. *Id.*

MALICIOUS PROSECUTION.

1. **IN ORDER TO RECOVER DAMAGES** for instituting or prosecuting a criminal action which has terminated in plaintiff's acquittal, it must be shown that the action was instituted in malice and without probable cause. *Paddock v. Watts*, 832.
2. **WHERE A CRIMINAL PROSECUTION IS COMMENCED** under circumstances which make it apparent that the prosecutor had some collateral purpose in view, rather than the vindication of the law, as where an agent has instituted a civil action against his principal to settle a dispute about a check, and the principal charges the agent with embezzlement of the check, upon which charge the agent is acquitted, a verdict against the principal for malicious prosecution without probable cause, it being shown that the check could not have been received by the agent or for his benefit, will not be set aside or disturbed. *Id.*
3. **INSTRUCTION DEFINING PROBABLE CAUSE** for prosecution, and stating that if such prosecution was false and malicious, and instituted without reasonable inquiry, and without the existence of such an apparent state of facts as would have induced a reasonable and prudent man to believe plaintiff guilty of the crime charged, then the verdict must be in his favor, is proper. *Id.*
4. **IN THE ABSENCE OF A MOTION FOR A VENIRE DE NOVO** or in arrest of judgment on a general verdict against three defendants for malicious prosecution, an objection to rendition of judgment against two of them, after denying a new trial to them, and granting it to the third, will not raise the question of error in the proceedings. *Id.*
5. **IN AN ACTION OF MALICIOUS PROSECUTION** it is competent for defendant to show, in order to disprove malice, that in instituting the action he acted under the advice of competent counsel, and where he lays all the facts before the latter and acts in good faith upon his opinion, he is not liable, though it transpires that he was mistaken. *Id.*
6. **EVIDENCE.** — Where in an action for malicious prosecution the prosecuting attorney testifies that upon the facts as stated to him he, as a lawyer and an officer, advised the institution of the prosecution, it is competent to ask him, as an expert, whether, if the facts upon which he proceeded had been changed in a certain manner, he would have advised the institution of the proceedings. *Id.*

MANDAMUS.

1. **WILL SOMETIMES ISSUE TO CONTROL A DISCRETION.** It properly issues to correct an abuse of discretion, if the case is otherwise proper. *Wood v. Strother*, 249.

cial action, or to compel a tribunal to whom the examination of a matter is intrusted to act in a particular way. *Id.*

2. **MAY PROPERLY ISSUE TO COMPEL AN OFFICER TO ACT IN A PARTICULAR MANNER**, though, in the exercise of a discretion conferred on him, he has determined not to so act, if, from an examination of the law, the court is of the opinion that the law did not intend his action to be final, and further, that there is no other "plain, speedy, and adequate remedy." *Id.*

See MUNICIPAL CORPORATIONS, 14.

MARGINS.

See CONTRACTS, 12-16.

MARRIAGE AND DIVORCE.

1. **DIVORCE — DECREE OBTAINED BY FRAUD ANNULLED.** — Where a petition for divorce is filed by the husband in the name of the wife, but without her knowledge or consent, at a time when she is ill and almost blind, and she has no notice nor knowledge of the proceedings for more than twenty years after they are instituted, the decree will be annulled as fraudulent and void. *Brown v. Grove*, 823.
2. **WITNESSES — COMPETENCY OF WIFE AS WITNESS TO ANNUL DECREE OF DIVORCE.** — In an action to annul a decree of divorce, the wife is a competent witness to testify as to what she did or did not do concerning the petition in the divorce suit; and though she may be incompetent to testify as to some of the matters involved, it is error to rule that she is totally incompetent. *Id.*

See NEW TRIAL, 4.

MASTER AND SERVANT.

1. **FELLOW-SERVANT — NEGLIGENCE.** — A foreman employed by a railroad company, and having charge of a gang of men who are subject to his orders only, is the agent of the company, and the latter is liable for his negligence in respect to the orders given, as the foreman and the gang of men are not fellow-servants. *Stephens v. Hannibal and St. Joseph R. R. Co.*, 336.
2. **NEGLECTENCE — DAMAGES.** — Where the master recklessly, carelessly, and negligently orders the servant to do work, when to obey the order at the time and under the circumstances is extra-hazardous, but does not plainly imperil the servant's life or limb, and he, in obeying the order, is injured without his fault, he is entitled to compensatory damages. *Id.*
3. **CONTRIBUTORY NEGLIGENCE — DAMAGES.** — Where master orders servant into a situation of danger, and he obeys and is thereby injured, he cannot be deprived of his remedy against his master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose. *Id.*
4. **OBEYING ORDERS — NEGLIGENCE.** — Master and servant are not on an equal footing where they have equal knowledge of danger. It is the primary duty of the servant to obey orders even if dangerous, and it does not follow because the latter could justify disobedience to an order that he is guilty of negligence in obeying it; but the question of negligence is for the jury from all the evidence. *Id.*

5. **NEGLIGENCE IN OBEYING ORDERS.** — Where the servant is ordered by the master to perform dangerous work, he is not guilty of negligence in obeying, unless to do so is clearly to bring on danger to life or limb. *Id.*
6. **NEGLIGENCE IN OBEYING ORDERS.** — The servant is not, at the peril of being discharged, bound to set up his judgment against that of his master, about obeying orders, or about things over which there can be a difference of opinion in the minds of reasonably prudent persons. *Id.*
7. **EVIDENCE — DAMAGES.** — In an action by a servant to recover damages for an injury sustained in obeying an order incurring extra hazard and danger, evidence as to whether plaintiff is a married man, and the number of children he has, is inadmissible, where there is nothing to justify the giving of exemplary damages, and the recovery must be entirely compensatory. *Id.*
8. **NEGLIGENCE — DEFECTIVE APPLIANCES.** — In an action by a servant against his master for negligence in furnishing improper or unsafe appliances for the servant's use, the petition must allege that the master either knew, or by the exercise of ordinary care might have known, of the dangerous and defective construction of the appliance; but an allegation that the master negligently furnished an appliance which was defective and unsafe is an equivalent averment, and sufficient. *Johnson v. Missouri Pac. R'y Co.*, 351.
9. **DEFECTIVE ALLEGATION CURED BY VERDICT.** — In an action by a servant against his master for negligence in furnishing unsafe or improper appliances, an allegation that "said defendant, wholly neglecting and disregarding its duty to this defendant," etc., though defective, is cured by verdict, when it appears that the second use of the word "defendant" was a mere clerical error, and the petition contains the other necessary averments. *Id.*
10. **WAIVER OF FORMAL DEFECTS IN PETITION.** — Where defendant pleads to the merits, he waives objection to mere formal defects, and cannot object that the petition does not state a cause of action. Such objection can only be interposed when the petition fails altogether to state any cause of action, and not where it is defectively stated. *Id.*
11. **LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT.** — One whose servants by his direction pile lumber, part of it without assistance, and the remainder of it with the voluntary and gratuitous assistance of a third party, in so unskillful and unsafe a manner that it falls upon and kills a person, without any negligence or want of care on the part of the latter, is liable for the injury, whether the party who assisted in piling a portion of the lumber was or was not his servant. *Andrews v. Boedecker*, 649.
12. **PERSON HAVING FULL CONTROL OF TIMBER-YARD OF RAILROAD COMPANY,** and who employs and discharges men, is to be regarded as a vice-principal; and one who takes his place in his absence is a temporary vice-principal; and the negligence of either, resulting in personal injury to a subordinate employee, is not the negligence of a fellow-servant, and the company is liable. *Baldwin v. St. Louis etc. R'y Co.*, 479.
13. **NOTICE TO VICE-PRINCIPAL.** — Notice to temporary vice-principal in charge of timber-yard of railroad company of a defect in the piling of the timber, resulting in the injury complained of, is notice to the company, irrespective of the question whether he had or had not piled the timber, or had any duty to perform in connection therewith. *Id.*

14. **SERVANTS DO NOT INHERIT KNOWLEDGE OF DEFECTS FROM DEFECTIVE MACHINES, APPLIANCES, OR STRUCTURES**, unless he knows of the danger, or it is so obvious that he must be presumed to know it. *Seamon v. Boston etc. R. R. Co.*, 733.
15. **APPARENT DANGER — ASSUMPTION OF RISK.** — Servant assumes risk from an uncovered saw projecting over its frame partly across a narrow passage-way, along which he was obliged to go in the performance of his duties, by accepting and remaining in the service, the danger being apparent. *Stephenson v. Duane*, 806.
16. **PROMISE BY MASTER TO REMOVE DANGER — CONTINUANCE IN SERVICE AFTER PROMISE.** — Servant, having the right to abandon the service because it is dangerous, does not engage to assume the risk, if he continues in the employment for a reasonable time, in consequence of assurances by the master that the danger should be removed; but if he continues his employment beyond the time within which he might reasonably expect the master would keep his promise, he will be deemed to have waived his objections, and assumed the risk. *Id.*
17. **AN EMPLOYEE HAS A RIGHT TO ASSUME** that his employer has supplied machinery free from latent defects which may expose the employee to hidden perils. *Louisville etc. R'y Co. v. Buck*, 883.
18. **DEFECTIVE APPLIANCE — EXPERT EVIDENCE.** — In an action against a railroad for damages for an injury received through defective appliances while in its employ, where it is averred that the appliance in question had been repaired at defendant's shops, and that it was owing to the imperfect and brittle condition and flaws in such appliance negligently furnished that plaintiff was injured, the evidence of two blacksmiths that the appliance had not been repaired with reasonable skill is admissible; and it is also admissible as showing defendant's knowledge of the defective condition of the appliance after being repaired by its agents in its shops. *Jackson v. Missouri Pacific R'y Co.*, 351.
19. **DEFECTIVE APPLIANCE — DAMAGES.** — In an action by a servant for damages for injury received through unsafe appliances furnished, where it is shown that plaintiff is aged thirty-five years, that his right eye was entirely destroyed, that the other eye was thereby affected whenever he took cold, and that he could not do more than half the work he could before the accident, a verdict for five thousand dollars is not excessive. *Id.*
20. **RAILROAD COMPANIES — LIABILITY FOR DEFECTIVE APPLIANCES — CUSTOM.** — In a action by a brakeman, who was in the employ of a railroad company, brought to recover damages against the company for injuries sustained by falling from an open car loaded with machinery, over which he had to pass, a finding by the jury that the defendant was negligent in not providing a foot-board over such car for the use of brakemen is justified; and this being true, the fact that such negligence was usual or customary would not relieve the defendant from liability for its consequences. *Hosie v. Chicago, Rock Island, and Pacific R'y Co.*, 518.
21. **ASSUMPTION OF RISK BY SERVANT.** — A person who accepts service as brakeman on a railroad, knowing that the company was not accustomed to provide foot-boards over open cars loaded with machinery, it not being shown, however, to be usual to place such cars where the brakemen were required to pass over them, cannot be said to assume the risk. *Id.*
22. **CONTRIBUTORY NEGLIGENCE.** — A brakeman on a railway train who, knowing the danger, attempts to pass over an open car loaded with

machinery, and not provided with a foot-board, and who falls and is injured, cannot, as a matter of law, be said to be guilty of contributory negligence in going upon the car, but the question is one for the jury, depending upon all the circumstances of the case. *Id.*

See DAMAGES, 2.

MECHANICS' LIENS.

1. **ATTACHES TO WHAT ESTATE OR INTEREST IN LAND.** — In order that a mechanic's lien may attach, it is indispensable that the party with whom the contract is made shall have some estate or interest in the premises upon which the building is erected or the improvement made; but such estate may be the fee, or an estate for life or for years, or any interest, legal or equitable, in the land. *Paulsen v. Manske*, 532.
2. **PARTY IN POSSESSION OF LAND UNDER CONTRACT OF PURCHASE IS OWNER** within the meaning of the mechanic's lien law, but only to the extent of the interest he owns; and it is to this interest that the mechanic's lien attaches. Where, therefore, the owner of a lot enters into an agreement with a builder, whereby the latter agrees to erect certain buildings on the lot, those on a certain part of the lot to cost a certain sum, in consideration of which the lot-owner is to convey the remainder of the lot to the builder, the owner agreeing to execute mortgages on the whole lot to enable the builder to make the improvements, the builder is to be considered a purchaser, and his interest will be subject to a mechanic's lien in favor of mechanics and material-men. *Id.*
3. **OWNER OF LAND WHO AUTHORIZES ANOTHER TO CONTRACT FOR ERECTION OF BUILDINGS** thereon thereby makes his land liable to the lien of mechanics for labor done and materials furnished. *Id.*
4. **WHERE RELEASE OF IS GIVEN TO MORTGAGEE** merely for the purpose of giving priority to the mortgage, the effect of the release will be confined to the purpose intended by the parties, and a stranger to it will not be permitted to avail himself of its benefits. And if such release names no person to whom it is made, and expresses no consideration, extrinsic facts may be looked to for the purpose of determining both the consideration and the party in whose favor it was intended to be made. *Id.*
5. **AGREEMENT TO ARBITRATE IS IMPLIEDLY REVOKED BY BRINGING SUIT** to enforce a mechanic's lien for the claim in reference to which the agreement was made. *Id.*

MISTAKE.

See CONTRACTS, 4; DEEDS, 4; GUARDIAN AND WARD, 1; NEGOTIABLE INSTRUMENTS, 11.

MORTGAGES.

1. **OF PERSONAL PROPERTY WERE VALID AT THE COMMON LAW**, and, in many cases, were sustained, without change of possession, in the absence of fraud, even against subsequent *bona fide* purchasers and creditors. *Tregear v. Etiwanda Water Co.*, 245.
2. **OF PERSONAL PROPERTY NOT OF A CLASS UPON WHICH THE STATUTE AUTHORIZES SUCH MORTGAGE** is nevertheless good between the parties thereto, and against all persons other than creditors of the mortgagor and subsequent purchasers in good faith and for a valuable consideration. *Id.*

3. **MAY INCLUDE BOTH REAL AND PERSONAL PROPERTY**, and, as to the personality, is valid between the parties without any change of possession. *Id.*
4. **ADVERSE POSSESSION.** — **TITLE AND RIGHT OF POSSESSION OF LAND ARE IN MORTGAGOR**, and so continue until divested by a sale and deed under foreclosure proceedings, and a grantee of the mortgagor before foreclosure acquires the same rights. He has absolute right of possession, which cannot be regarded as adverse to the mortgagee, unless accompanied with a denial of all right in the mortgagee; and this is true of the possession of the grantee of the mortgagor even after foreclosure, where such grantee was not made a party to the foreclosure proceedings. *Grether v. Clark*, 491.
- A **STATUTE OF LIMITATIONS HAVING COMMENCED TO RUN AGAINST ANCESTOR IN HIS LIFETIME**, its operation is not suspended by his death in favor of his heirs; and the fact that some of them are minors does not affect the result, since the exception in their favor created by the Iowa Code, section 2535, applies only to causes of action which originally accrue in their favor. And where the ancestor foreclosed his mortgage, and purchased the property at the foreclosure sale, not making the grantee of the mortgagor, who was in possession, a party, and then died leaving minor heirs, his right of action to enforce the mortgage lien against such grantee accrued in his lifetime, and was barred as against his minor heirs in ten years after it accrued, though they had not then attained their majority. *Id.*
6. **THIRD PERSONS ARE NOT CHARGED WITH CONSTRUCTIVE NOTICE OF CHATTEL MORTGAGE** until the proper entries required by the statute (Iowa Code, section 1925) have been entered by the recorder in the index; and this rule is not affected by a custom of the recorder, when instruments are delivered to him to be recorded near the close of business on one day not to enter them in the index until the next morning. *Hibbard v. Zenor*, 497.
7. **EVIDENCE TO ESTABLISH THAT DEED ABSOLUTE ON ITS FACE WAS INTENDED TO BE MORTGAGE**, or that the real estate described therein belongs in fact to some other person than the grantee, must be clear, satisfactory, and conclusive, and not made up of loose and random statements. *Ensminger v. Ensminger*, 462.
See ATTACHMENT, 9; DEEDS, 1; INSURANCE, 18, 21, 22, 23.

MUNICIPAL CORPORATIONS.

1. **POWERS.** — Any fair, reasonable doubt concerning the existence of power in a municipal corporation is resolved against it, and the power denied. It only has such powers as are granted in express words, necessarily or fairly implied in or incident thereto, and those essential to its declared objects and purposes. *City of St. Louis v. Bell Telephone Co.*, 370.
2. **POWER UNDER CHARTER.** — Under its charter, the city of St. Louis has power to regulate the use of its streets, and this power extends to new uses as they come into existence as well as the uses common and known at the time the charter was granted. The erection and maintenance of telephone-poles is one of these new uses, and is a proper use of the streets which the city may reasonably regulate. *Id.*
3. **POWER TO REGULATE CHARGES FOR TELEPHONE SERVICE** is neither included in nor incidental to the power granted the city of St. Louis under her charter to regulate the use of the streets. *Id.*

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4. **POWER TO REGULATE CHARGES FOR TELEPHONE SERVICE.** — The charter of the city of St. Louis giving the mayor and assembly power “to tax, and regulate telegraph companies or corporations, and all other business, trades, avocations, or professions whatever,” makes such companies *ejusdem generis* with telegraph companies, though they were not in existence at the date the charter was granted; but the power to “regulate” telephone companies does not confer the power on the city to fix a rate of charges for telephone service by ordinance.
5. **POWER TO REGULATE TELEPHONE CHARGES.** — Power granted to the city of St. Louis by her charter “to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient, in maintaining the peace, good government, health and welfare of the city, its trade, commerce, and manufactures,” does not include power to pass ordinances fixing rates for telephone service. *Id.*
6. **SUPERVISORS OF TOWNSHIP — POWER TO TAKE UP OLD ORDER AND NEW ONE.** — Supervisors of township, in Pennsylvania, have no power to take up a township order, issued by the auditors, and give another in its stead. *Township of Snyder v. Bovard*, 118.
7. **OFFICERS — NEGLIGENCE — INDIVIDUAL LIABILITY.** — Board of commissioners of a city act in a ministerial capacity, and are not usually liable for injuries to a person caused by the negligence of their employees in repairing and reconstructing a bridge; and the city itself is not liable where, instead of letting the work by contract to the lowest bidder, as required by the charter of the city, they resolved to do the work themselves, under the supervision of their committee on bridges, and a superintendent appointed by them, in accordance with plans and specifications adopted. *Robinson v. Rohr*, 810.
8. **LIABILITY FOR ACTS OF LICENSEE.** — City having an ordinance prohibiting the use of gunpowder, but allowing the mayor to grant permits for its use on certain occasions, is not liable for damages for injury to a person by a licensee, in the absence of proof that the authorized act was intrinsically dangerous. *Wheeler v. City of Plymouth*, 837.
9. **ORDINANCES.** — City is not liable for failure to enact or to enforce its ordinances. *Id.*
10. **DEFECT IN HIGHWAY FOR WHICH TOWN IS ANSWERABLE MUST BE THE CAUSE OF THE INJURY.** — That it is the sole cause of the injury complained of. If such is the combined result of the defect, united with some distinct, and concurring cause, the town is not liable for the injury unless the concurring cause be a pure accident unaided by human agency. *Prosser v. Inhabitants of Weymouth*, 691.
11. **TOWN IS NOT LIABLE TO A PERSON WHO IS INJURED BY THE FALLING OF A DERRICK IN A HIGHWAY,** when the derrick was then in use, and the injury was occasioned by the fact that it was so insufficiently supported by its guy-ropes that it was pulled from its position by its weight and the weight of a stone which was then being lifted by it. *Id.*
12. **TOWN IS NOT RESPONSIBLE FOR THE ACTS OF HIGHWAY SURVEYORS OR THE MEN EMPLOYED BY THEM ENGAGED IN THE PERFORMANCE OF THEIR DUTY** imposed upon them by law to repair the highways. This principle remains applicable, though the town made a special appropriation for the work, and its selectmen, having general oversight of the district, notified the surveyor that the appropriation had been made, and that it was for him to do when the proper time arrived. *Id.*

13. **DUTY TO KEEP STREETS IN REPAIR.** — It is the duty of a corporation to keep its streets in such condition that persons using them properly, who are not so deficient in reasonable prudence and ordinary care as to bring injury upon themselves, can do so without peril. *Town of Knightstown v. Musgrove*, 827.
14. **MANDAMUS WILL ISSUE TO COMPEL AN AUDITOR TO COUNTERSIGN A WARRANT FOR A STREET ASSESSMENT**, although the statute under which he is acting declares that he, before countersigning such warrant, "shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair." The word "fair" adds nothing to the force of the word "legal." Therefore, if the proceedings are, in the opinion of the court, legal, it will compel the auditor to regard them as legal and fair, and to act accordingly. *Wood v. Strother*, 249.
15. **A SECOND ASSESSMENT FOR STREET WORK MAY BE MADE** if the first is declared invalid, and the prior proceedings are sufficient to support it. If some of the property owners have paid the first assessment, such payments may be treated as advance payments on the second. *Id.*

See CORPORATIONS, 8.

MUTUAL BENEFIT SOCIETY.

1. **DECLARATIONS OF PAY-MASTER OF RAILROAD COMPANY AS TO DEDUCTION OF DUES FOR EMPLOYEES' RELIEF ASSOCIATION.** — Declarations of a pay-master of a railroad company, that a deduction was made from an employee's wages for dues owed to an employee's relief association, are inadmissible to establish the employee's membership in the association, the pay-master having no express authority to make the declarations, and not being authorized to make the deduction, although the constitution and by-laws of the association authorized the company to deduct dues from members, and not being an agent, officer, or servant of the association. *Baltimore and Ohio R. Relief Ass'n v. Post*, 147.
2. **EMPLOYEES' RELIEF ASSOCIATION — MEMBERSHIP — DEDUCTION BY RAILROAD COMPANY OF DUES FROM WAGES OF EMPLOYEE.** — Deduction by a railroad company of dues to an employees' relief association, from the wages of an employee, does not amount to an acceptance of the employee's application to become a member of the association, where the constitution and by-laws of the association authorized the company to deduct dues from members, but it does not appear that the company had been officially notified by the association that the employee had been admitted to membership. *Id.*
3. **ID. — TESTIMONY OF MEDICAL EXAMINER.** — Testimony of the medical examiner of an employees' relief association is admissible, in an action to recover benefits, to show that the plaintiff had never been accepted as a member. *Id.*
4. **EMPLOYEES' RELIEF ASSOCIATION — EVIDENCE — WEEKLY BENEFITS — MORTALITY TABLES.** — Mortality tables are not admissible in evidence on behalf of the plaintiff, in an action against an employees' relief association to recover weekly benefits accruing on account of his inability to labor. *Id.*
5. **EMPLOYEES' RELIEF ASSOCIATION — WEEKLY BENEFITS ACCRUING SUBSEQUENT TO COMMENCEMENT OF ACTION — ASSUMPT.** — Plaintiff cannot recover any benefits accruing subsequent to the commencement of

- the action in *assumpsit* for weekly benefits against an employees' relief association. *Id.*
6. **EMPLOYEES' RELIEF ASSOCIATION — BENEFITS — MEASURE OF DAMAGES.** — Measure of damages in *assumpsit* for benefits against an employees' relief association is the sum stipulated to be paid under the charter and by-laws, and not such an amount as the jurors' consciences may approve as just. *Id.*
 7. **EMPLOYEES' RELIEF ASSOCIATION — "TOTAL INABILITY TO LABOR."** — Phrase "total inability to labor," contained in the constitution and by-laws of an employees' relief association, means a total inability to earn a livelihood at any employment, and not at the particular employment at which the member was engaged at the time of his injury. *Id.*
 8. **ID. — EVIDENCE — RECEIPTS FOR BENEFITS.** — Receipts of the plaintiff for benefits as a former member of an employees' relief association are inadmissible in an action against the association to recover benefits, for the purpose of showing by a clause therein the meaning of the phrase "total inability to labor," contained in the constitution and by-laws of the association, and that the plaintiff had knowledge of the practical construction placed upon the words. *Id.*
 9. **MUTUAL BENEFIT SOCIETY IS NOT LIFE INSURANCE COMPANY,** nor is its certificate of membership a policy of life insurance, within the restricted sense of those terms used in the statute relating to life insurance companies, but such certificate is in the nature of a mutual life insurance policy, and such contracts are, therefore, subject to the rules of law governing life insurance policies, except so far as those rules must be held to be modified by the peculiar organization, objects, and policy of such societies. *Martin v. Stubbins*, 620.
 10. **PERSON HAVING INSURED HIS OWN LIFE MAY ASSIGN POLICY** and provide for the payment of the insurance money to an assignee who has no insurable interest in his life, notwithstanding the general rule that no person can procure a valid insurance on the life of another unless he has an insurable interest in such life; and *a fortiori* may a creditor who has an insurable interest in the life of his debtor make such an assignment. *Id.*
 11. **BENEFICIARY NAMED IN CERTIFICATE OF MEMBERSHIP OF MUTUAL BENEFIT SOCIETY ACQUIRES NO VESTED RIGHT** to the benefit to accrue upon the death of the member until such death occurs, and the member may, therefore, during his lifetime, exercise the power of appointment without other limits or restrictions than such as are imposed by the organic law of the society, or the rules and regulations adopted in conformity therewith. *Id.*
 12. **MEMBER OF MUTUAL BENEFIT SOCIETY MAY ASSIGN HIS CERTIFICATE OF MEMBERSHIP TO HIS CREDITOR,** where the statute under which the society was organized, and which the constitution of the society followed, empowers the member to name as his beneficiary his legatee or devisee without restriction. The mode of selection is mere matter of form, and does not go to the substance of the right to select beneficiaries. The failure of the member to adopt the mode prescribed by the statute, by executing a will making the assignee his legatee, might be a matter of which the society could object, but if the society does not object, the widow of the member, who was the original beneficiary named in the certificate, has no rights in the certificate which can justify her in interposing an

objection to a decree of the court ordering payment to be made to the assignee to the extent of his debt. *Id.*

See INSURANCE, 34.

NEGLIGENCE

1. **PARTIES WHO CO-OPERATE IN DOING NEGLIGENT ACT CAUSING INJURY ARE LIABLE**, either jointly or severally, for the damage thereby occasioned. *Andrews v. Boedecker*, 649.
2. **QUESTION OF NEGLIGENCE OUGHT NOT TO BE TAKEN FROM THE JURY, UNLESS THE CONDUCT OF THE PLAINTIFF RELIED UPON AS CONTRIBUTORY NEGLIGENCE** is established by clear and uncontradicted testimony, and presents some decisive act in regard to the character and effect of which no room is left for ordinary minds to differ. *Baltimore and Ohio R. R. Co. v. Kane*, 387.
3. **IN ACTION FOR INJURY ALLEGED TO HAVE BEEN CAUSED BY NEGLIGENCE OF DRIVER OF STREET-CAR, BURDEN OF PROOF** is on company, as defendant, to show that the injury originated from causes beyond the driver's control. Negligence is presumed from the mere fact of injury, in such case; but where the direct cause of injury results from the act of another over whom the carrier has no control, the burden is on plaintiff. *Central Passenger R'y Co. v. Kuhn*, 309.
4. **BURDEN OF PROOF IS UPON PLAINTIFF, IN ACTION TO RECOVER FOR PERSONAL INJURY** on the ground of the defendant's negligence to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part. If his own evidence shows that he brought the injury on himself by his own carelessness, the plaintiff may be nonsuited. *Blanchard v. Lake Shore etc. R'y Co.*, 630.
5. **IMPUTATION OF NEGLIGENCE OF DRIVER OF VEHICLE TO INVITED PASSENGER.** — Where one rides upon the public highway in the vehicle of another, merely on invitation of the latter, and does not exercise or assume any control over the movements of the team, the driver of the vehicle does not become his agent or servant in such sense that his negligence, contributing to an injury occasioned by a defect or obstruction in the highway, will be imputed to him, so as to defeat his recovery in an action against the town. *Nesbit v. Town of Garner*, 486.
6. **PERSONS ENGAGED IN COMMON ENTERPRISE.** — If several persons are engaged in a common enterprise, and one is injured by the joint negligence of an associate and another, the negligence of his associate will be imputed to him, and will defeat all right of recovery against such other. But the question whether they were engaged in a common enterprise should be submitted to the jury. *Id.*
7. **CONTRIBUTORY NEGLIGENCE OF DRIVER OF CARRIAGE.** — Where one accepts the invitation of another to ride in his carriage, and thereby becomes in effect his comparatively passive guest, without authority to direct or control the conduct or movements of the driver or conveyance, and without reason to suspect his prudence or competency to drive in a careful and skillful manner, his want of care should not be imputed to the guest, so as to deprive the latter of his right to compensation from a city whose neglect of duty in obstructing the street has resulted in his injury. *Town of Knightstown v. Musgrove*, 827.
8. **ONE WHO SUSTAINS AN INJURY, without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he**

is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty caused the injury, even though the negligence of some third person with whom the injured person was not identified as above may have contributed thereto. *Id.*

9. **BEFORE CONCURRENT NEGLIGENCE** of a third person can be interposed to shield another, whose neglect of duty has caused an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. *Id.*
10. **EXERCISE OF DUE CARE BY TRAVELER IS NOT INCONSISTENT WITH THE MOMENTARY DIVERSION OF HIS ATTENTION** from a defect in a highway of which he had previous knowledge. Hence when an old lady walking in the dark, on hearing other persons approaching on the same side of the road, crossed to the other side, where she knew a bad place or defect existed, into which she fell because she was not then thinking of the road, it was held that it was for the jury to determine, from all the circumstances of the case, whether she had conducted herself with that care and circumspection which ought reasonably to have been exercised by her as a traveler. *Kelly v. Inhabitants of Blackstone*, 730.
11. **SUNDAY LAW.** — If a man is killed while acting in disobedience to the Sunday law, such disobedience not being the efficient cause of the injury received, his personal representatives will not be deprived of their right of action against a party whose negligent omission to perform a legal duty was the real cause of the death. *Louisville etc. R'y Co. v. Buck*, 883.

See **AGENCY**, 7; **CARRIERS**, 2-4; **INSTRUCTIONS**, 2; **MASTER AND SERVANT**, 1-6, 8, 9, 11, 22; **PARENT AND CHILD**; **RAILROADS**, 1-12, 14, 16.

NEGOTIABLE INSTRUMENTS.

1. **CONSIDERATION.** — Note of the president of corporation, binding upon him personally, is not without consideration if made for the purpose of taking up a note of the corporation which is at the time surrendered and canceled. *Hobson v. Hassett*, 193.
2. **ACTION BY INNOCENT HOLDER.** — A grantee who, when he takes his deed, assumes the payment of certain notes against his grantor cannot defeat an action on them by an innocent holder by alleging fraudulent misrepresentations and concealments by the grantor as to encumbrances which wholly defeated the title, in the absence of proof showing that such holder was in any way connected with the alleged fraudulent misrepresentations made by the grantor. *Fitzgerald v. Barker*, 375.
3. **INNOCENT PURCHASER BEFORE MATURITY.** — A purchaser of notes before maturity is presumably an innocent purchaser, and he cannot be prejudiced nor his title invalidated by subsequently learning that the maker thereof has been a fraud-feasor. *Id.*
4. **EVIDENCE.** — Where, in an action between the same parties on a note similar in all respects to one already paid, it is proposed to have defendant state the circumstances under which the first note was paid, the relevancy of such testimony must first be shown, or it will be presumed that the court committed no error in rejecting it. *Id.*

The facts constituting the diligence used in getting the evidence should be stated. *Boot v. Brewster*, 515.

4. **NEWLY DISCOVERED EVIDENCE.** — In an action to annul a decree of divorce, a new trial will not be granted on the ground of newly discovered evidence when the utmost force that can be allotted to such evidence is that it tends to impeach the plaintiff. *Brown v. Grove*, 823.

NONSUIT.

See AGENCY, 2; TRIAL, 2.

NOTICE.

See MORTGAGES, 6

OFFICE AND OFFICERS.

See ARREST, 1-5; ATTACHMENT, 8; PLEADING, 7.

PARENT AND CHILD.

- CONTRIBUTORY NEGLIGENCE OF PARENT.** — Plaintiff is chargeable with contributory negligence, and is not entitled to recover for injuries sustained by his minor son while in the employ of the defendants, if, knowing that the work was dangerous, he permitted his son to continue in it, without objection. *Schwenk v. Kehler*, 70.

PARTITION.

1. **OF LANDS PURCHASED FOR SPECIAL USE.** — One tenant in common cannot, without the consent of his co-tenants, have a partition of lands which they have devoted to a particular use, which use enters into the consideration of the contract creating it; and this rule applies, and perhaps a *fortiori*, where the use is charitable. *Appeal of Lathaw*, 76.
2. **ONE CONGREGATION CANNOT, WITHOUT CONSENT OF OTHER CONGREGATIONS, HAVE PARTITION OF LANDS,** purchased by all for their common benefit, for a parsonage and glebe; and especially where the lands were conveyed to trustees of the different congregations for the benefit of a "ministerial charge," thus creating an active and continuing trust, the fee remaining in the trustees as long as the charge continues. *Id.*

PARTNERSHIP.

See ATTACHMENT, 7; NEGOTIABLE INSTRUMENTS, 8, 9.

PAYMENT.

- WHAT IS.** — MONEY CANNOT BE REGARDED AS RECEIVED IN PAYMENT of a deficit due from a defaulting officer of a corporation when, without any accounting with his principal, such officer secretly transfers such moneys by means of checks drawn on another corporation of which he is also an officer, though he charges himself upon a private memorandum with the moneys so fraudulently withdrawn. The moneys remain the property of the corporation from which they were misappropriated. *Atlantic Mills v. Indian Orchard Mills*, 698.

See ASSUMPT, 2; HUSBAND AND WIFE, 7; LIMITATIONS, 8.

1. **PEDDLER IS ITINERANT INDIVIDUAL, ORDINARILY WITHOUT LOCAL HABITATION** or place of business, who travels about with merchandise for the purpose of selling it. *City of Davenport v. Rice*, 454.
2. **MUNICIPAL ORDINANCE.—PERSON IS NOT PEDDLER, WITHIN MEANING OF CITY ORDINANCE** imposing a fine for hawking and peddling goods without a license, who, being in the employ of a resident mercantile establishment, calls on citizens and solicits orders for goods kept for sale by it, and who usually carries samples with him, although the ordinance declares such acts to be peddling. *Id.*

PERSONAL INJURIES.

See DAMAGES, 4-8; EVIDENCE, 3, 5, 6, 9; NEGLIGENCE, 4.

PERSONAL PROPERTY.

See CORPORATIONS, 7; MORTGAGES, 1-3; TAXATION, 2.

PLEADING.

1. **CONTINUANCE FOR PURPOSE OF OBTAINING EVIDENCE.**—Under Iowa practice, if the petition is amended, changing the issues, and the defendant has additional evidence which he desires to take to meet the change of issues, he must so show by affidavit; and he is not, as a matter of right, entitled to a continuance for the purpose of obtaining such evidence. *Barnes v. Hekla Fire Ins. Co.*, 450.
2. **PARTY IS NOT ESTOPPED, BY BRINGING ACTION AT LAW, FROM AMENDING** his pleadings before the case has finally been submitted to the court, so as to change it into an action in equity. *Id.*
3. **AMENDMENT CHANGING CAUSE OF ACTION.**—It is not an abuse of discretion for the court to permit an amendment counting upon a *quantum meruit*, when the original complaint sought to recover according to the terms of a contract, and the facts stated in both complaints are substantially identical. *Cox v. McLaughlin*, 164.
4. **DEFECT OF PARTIES SHOWN BY THE PETITION AND NOT DEMURRED TO IS** WAIVED under section 92 of the Kentucky Civil Code. *Metcalf v. Brand*, 282.
5. **PARTIES DEFENDANT.**—IN ACTION AGAINST A CORPORATION TO COMPEL IT TO TRANSFER TO PLAINTIFF certain shares of its stock, the person to whose rights plaintiff claims to have succeeded is not a necessary party defendant. *Tregear v. Etowanda Water Co.*, 245.
6. **COMPLAINT TO COMPEL A CORPORATION TO TRANSFER CERTAIN SHARES OF ITS STOCK TO PLAINTIFF IS SUFFICIENT**, if it alleges that the owner of such stock mortgaged it, without delivering possession thereof to the mortgagee, or making any transfer on the books of the corporation; that the mortgage was foreclosed, and a decree of sale obtained under which the stock was sold to plaintiff, who received a certificate of sale, and afterwards a deed therefor pursuant to such sale. Upon the facts stated, the interest of the mortgagor in the stock ceased on the consummation of the sale as effectually as if he had assigned his shares to the plaintiff. *Id.*
7. **IN ACTION BY A CONSTABLE** for the wrongful taking of goods from his possession, it is not necessary for him to refer to the writ under which he took possession, in his complaint, nor allege that he obtained any

property in or possession to the property by virtue of such writ. *Penland v. Leatherwood*, 38.

See JUDICIAL SALES, 3; MASTER AND SERVANT, 10.

PLEDGE.

See CARRIERS, 10, 11

RAILROADS.

1. IT IS GROSS NEGLIGENCE FOR RAILROAD COMPANY, WHOSE ROAD CROSSES PUBLIC THOROUGHFARE, NOT TO KEEP FLAG-MAN at such point at night, there being no bars or gates erected, and there being a dense population on each side of the track, over which trains are constantly passing. *Central Passenger R'y Co. v. Kuhn; Louisville etc. R. R. Co. v. Kuhn*, 309.
2. NEGLIGENCE MAY BE IMPUTED TO STREET-CAR COMPANY whose road intersects steam-car tracks, where a driver of one of its cars takes no pains to satisfy himself of the approach of a train, when others on his car see it coming in time to enable him, by exercising the slightest diligence, to avoid an accident, but instead of so doing, he attempts to cross in front of the train with his car, in consequence of which an injury results. *Id.*
3. ATTEMPT TO ENTER A MOVING CAR IS NOT, PER SE, CONTRIBUTORY NEGLIGENCE, irrespective of the rate of speed at which it is moving. All the circumstances must be taken into consideration. One prominent fact should not be considered to the exclusion of all the other circumstances. *Baltimore and Ohio R. R. Co. v. Kane*, 387.
4. ATTEMPTING TO BOARD A TRAIN AT A PLACE OTHER THAN THE PLATFORM PROVIDED FOR THAT PURPOSE IS NOT NEGLIGENCE if the company was in the habit of receiving passengers at other points, or if on the occasion in question, its servants invited or directed the person injured to board the train at the place where his attempt was made. *Id.*
5. RAILWAY COMPANY DESIRING TO PROHIBIT THE BOARDING OF ITS PASSENGER TRAINS ELSEWHERE THAN AT ITS PLATFORM should give notice to that effect; and one cannot be charged with negligence in attempting to board a train, unless he knows of such prohibition, or ought to have known of it, either from its publicity, or from the condition of the place where he attempted to enter. *Id.*
6. ONE WILL BE PRESUMED TO BE AN OFFICER OF A RAILWAY COMPANY WHO WEARS ITS UNIFORM IN ITS DEPOT, and there assumes to give information about trains, and directions to intending passengers as to the train which it was proper for them to take. *Id.*
7. BEFORE STARTING A TRAIN OR CAR WHICH ONE HAS ENTERED FOR A LAWFUL PURPOSE, as where an employee has entered a pay-car to obtain his wages, he must be afforded a reasonable time to transact his business, and given proper warning of the purpose of putting the train in motion, to enable him, by the use of reasonable diligence and care, to leave the car without risk of injury to himself in getting off. *New York, Philadelphia, and Norfolk R. R. Co. v. Coulbourn*, 430.
8. JUMPING FROM A CAR MOVING AT THE RATE OF FIVE MILES AN HOUR does not necessarily constitute negligence. The jury, in determining whether a person who so jumped was guilty of contributory negligence,

the case, and to determine from them whether he acted as a reasonably cautious man would under like circumstances. *Id.*

9. NEGLIGENCE IS NOT TO BE IMPUTED TO A RAILROAD COMPANY FROM THE FACT THAT AN ENGINE AND TENDER WERE RUNNING BACKWARD ON A track through the country, where people were not expected and had no right to be on such track. *State v. Baltimore and Ohio R. R. Co.*, 436.
10. PERSON WALKING ON A RAILROAD TRACK IS A TRESPASSER, AND THE COMPANY'S SERVANTS ARE UNDER NO OBLIGATION to keep a look-out for his protection. *Id.*
11. PERSON WALKING ON A RAILROAD TRACK MUST LOOK AND LISTEN FOR APPROACHING TRAINS. — His failure to do so is negligence of the grossest nature, and defeats his right to recover for injuries sustained, unless there is a want of reasonable care on the part of the employees of the company after becoming aware of the perilous situation of the party injured. *Id.*
12. NEGLIGENCE. — IT CANNOT BE SAID, AS MATTER OF LAW, that brakeman in employ of railroad company was guilty of contributory negligence, where, in obedience to his conductor's orders, he mounted the front end of a train of freight-cars, and went to the rear of the train, descended, and made a coupling with a standing car, but in so doing was injured by reason of the speed at which the train was moving; it appearing that when he mounted the train he had reason to believe the conductor would follow him, as was his custom in such cases, and slacken the speed of the train; and although, by a glance to the rear when he was about to descend from the cars he could have seen that the conductor had not gone on top of them, and that, if he had noticed the cars as they approached him, he might have seen that their speed had not been reduced. *Henry v. Sioux City and Pacific Railway Co.*, 457.
13. EVIDENCE. — QUESTION WHETHER RATE OF SPEED OF MOVING TRAIN WAS DANGEROUS at time of injury to plaintiff is in the nature of a conclusion to be drawn from the facts proven, and such others as are in the common knowledge of all men; and it is the duty of the jury to draw that conclusion. The opinions of witnesses qualified by their experience to express an opinion on the subject are competent evidence; but the jury are not absolutely bound to accept such opinions, or to be governed by them in forming their conclusion. *Id.*
14. PERSON WALKING ON RAILROAD TRACK, NOT AT PUBLIC CROSSING, IS TRESPASSER, and guilty of gross negligence, where he is doing so for his own convenience, and not on any business of the railroad company; and if he is run over by a train and killed, the company will not be liable in damages for his death, unless it was willfully or wantonly caused, or unless the company is chargeable with such gross negligence as evidences willfulness. *Blanchard v. Lake Shore etc. R'y Co.*, 630.
15. NO IMPLIED ASSENT TO USE OF RAILROAD TRACK FOR WALKING THEREON CAN BE INFERRED from the fact that the company has not prohibited or interfered with a custom on the part of persons in the locality to make use of the track for that purpose. *Id.*
16. FACT THAT RAILWAY TRAIN WAS RUNNING AT GREATER SPEED THAN WAS PERMITTED by a city ordinance at the time when it struck and killed a person walking on the track may be considered by the jury in determining whether the company was guilty of such negligence as caused the death of the deceased, but it will not relieve him from the

exercise of ordinary care, nor will the speed of the train alone furnish a sufficient reason for holding that the injury was willful or wanton. *Id.*

17. CITY ORDINANCE REQUIRING LOCOMOTIVE BELL TO BE RUNG CONTINUALLY while the engine is running within the city is not admissible in evidence on the trial of an action for the killing of a person who was walking on the track, where the existence of such ordinance is not alleged, or its violation charged, in the declaration. *Id.*
18. STATUTE REQUIRING LOCOMOTIVE BELL TO BE RUNG AT DISTANCE OF EIGHTY RODS from a street crossing does not apply to a street over which no travel passes, except upon a viaduct far above and out of the way of the tracks. *Id.*
19. CORPORATION IS LIABLE TO A BRAKEMAN INJURED BY A SIGNAL-POST PLACED so near the track that it knocked him off of a ladder on the side of a freight-car on which he was climbing, in the discharge of his duty, when he was unfamiliar with the road, and had not been informed of the existence of permanent structures so near the track as to make it dangerous to be in the place at which he was when hurt. *Scanlon v. Boston etc. R. R. Co.*, 733.
20. COMPANY MAY GRANT TO ONE PERSON THE EXCLUSIVE RIGHT OF COMING UPON ITS GROUNDS TO SOLICIT THE PATRONAGE OF INCOMING PASSENGERS, with respect to carrying their baggage or merchandise, and may exclude all other persons from the exercise of such right, notwithstanding a provision of the general statutes that "every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise or other property upon its railroad, and for the use of its depot and other buildings and grounds." The statute applies only to relations between railroads as common carriers and their patrons. *Old Colony Railroad Company v. Tripp*, 661.

See AGENCY, 5; ADVERSE POSSESSION, 3; EMINENT DOMAIN; HIGHWAYS, 1-3.

RECEIPTS.

See GUARDIAN AND WARD, 2, 6, 7.

RECEIVERS.

See ATTACHMENT, 7.

REGISTRATION.

NOTICE — REGISTRATION OF TAX DEED VOID UPON ITS FACE does not impart notice to any person. *Oglesby v. Hollister*, 177.

REPLEVIN.

JUDGMENT IN REPLEVIN WILL NOT BE REVERSED because of uncertainty in the description of the property, where the record, as a whole, sufficiently indicates and points it out. *Coleman v. Reed*, 484.

See APPEAL, 6; EVIDENCE, 10.

RIPARIAN RIGHTS.

See WATERCOURSES.

1. **WHEN PASSES TITLE.** — If a buyer purchases or orders a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract the specific quantity by delivering them to a vessel designated by the buyer, or in the absence of such designation, to a common carrier, the mere fact that the contract contains a stipulation that they are to be paid for by note or in cash on arrival does not prevent the title from passing, or make either payment or arrival a condition precedent thereto. The goods become the property of the vendee, and are at his risk from the time they are put on board the vessel. *Farmers' Phosphate Co. v. Gill*, 443.
2. **TITLE PASSES ON DELIVERY OF THE PROPERTY ON BOARD A VESSEL FOR THE VENDERS,** and indorsement and delivery of the bill of lading to them, although the contract of sale stipulates that the property shall be weighed at the seller's expense, and (being river-rock phosphate) that it shall contain a certain percentage of bone phosphate, or in the event of its falling below that percentage, that a proportionate allowance shall be made from the contract price. *Id.*
3. **WARRANTY, WHEN IMPLIED IN CONTRACT OF SALE.** — By the code of California, "one who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so at the place of delivery as can be secured by reasonable care." *Blackwood v. Cutting Packing Co.*, 199.
4. **WARRANTY IS IMPLIED IN CONTRACT FOR THE SALE OF FRUIT** not then in existence that it shall be sound and merchantable. Fruit must be deemed "merchandise" within the meaning of the statute providing that there shall be an implied warranty upon the part of one who agrees to sell merchandise not then in existence. *Id.*
5. **DIFFERENCE BETWEEN A SALE AND AN AGREEMENT TO SELL** is that in the former case the title passes, while in the latter it does not. *Id.*
6. **TITLE IS NOT REGARDED AS PASSING UNDER A CONTRACT OF SALE** when there is neither delivery of the goods sold nor payment of the purchase price, nor a waiver of such payment. *Id.*
7. **TITLE DOES NOT PASS UNDER A CONTRACT OF SALE** when the goods are not in a condition in which the vendee can be called upon to accept them, and where the vendor is to do something further to the goods for the purpose of putting them into a deliverable state. *Id.*
8. **TITLE CANNOT PASS UNDER A CONTRACT OF SALE** when the property sold has not been identified, nor when something remains to be done for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend upon the quantity or quality of the goods. *Id.*
9. **SALE, WHEN COMPLETE.** — USE OF THE TERM "SOLD" does not conclusively indicate a consummated sale. *Id.*
10. **GOODS ARE NOT ACCEPTED** so as to waive the purchaser's right to object that they are not of the quality called for by his contract merely by the receipt and retention of part of them by the purchaser, when he at the same time objects thereto, and stipulates that such receipt shall not be regarded as an acceptance. *Id.*
11. **DELIVERY OF GRAIN TO ELEVATOR.** — TRANSACTION IS SALE, and not a bailment, where grain is delivered to an elevator-owner under an alleged oral agreement that the latter was to have the grain on paying

the highest market price, or in case he did not buy, to receive pay for weighing, but not for storage, it being known to the party who delivered the grain that it was indiscriminately mixed in a mass with other grain, from which the elevator-owner was accustomed to ship when prices suited him. And the latter having subsequently mortgaged all the grain then in the elevator, but not including any of the identical grain in question, the party who delivered it could not, as against the mortgagees, set up any claim to the mortgaged grain. *Barnes v. McOrea*, 473.

SCHOOLS.

COMMON SCHOOLS—RULES AND REGULATIONS.—Rule requiring pupils to pay for school property which they may wantonly and carelessly break or destroy is not reasonable, and teachers have no right to make such rule and enforce it by chastisement of the pupils. *State v. Vanderbilt*, 820.

SLANDER.

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

1. **PERFECT TITLE MUST BE ONE THAT IS GOOD AND VALID BEYOND ALL REASONABLE DOUBT.** Though the court may entertain an opinion in favor of the title, yet if it be satisfied that that opinion may fairly and reasonably be questioned by other competent persons, it will refuse specific performance. *Turner v. McDonald*, 189.
2. **TITLE TO BE GOOD** should be free from litigation, palpable defects, and grave doubts, and should consist of both the legal and equitable title, and be fairly deducible of record. *Id.*
3. **WILL BE DECREED OF A CONTRACT FOR THE SALE OF PERSONAL PROPERTY** in the absence of an adequate remedy at law, as where stocks are sold which are limited in amount, held in a few hands, and not ordinarily to be obtained, or where articles of a personal nature are peculiar or individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, and the like. *Adams v. Messinger*, 679.
4. **WILL BE DECREED OF A CONTRACT BY THE OWNER OF A PATENT RIGHT** to furnish articles covered by his patent, and which, therefore, he alone can supply, when such articles can be made without the exercise of any peculiar skill or ability. *Id.*
5. **WILL BE DECREED OF A CONTRACT TO OBTAIN PATENTS IN A FOREIGN COUNTRY** for improvements which should thereafter be made in certain described articles or machinery, and to assign such patents when obtained. *Id.*
6. **OF PART OF A CONTRACT, MAY BE DECREED** when it consists of two distinctly separable parts. Even if it relates to a single subject, the defendant may be compelled to perform in part, and to compensate the complainant for the part which cannot be performed, if it be possible to compute what is just, so far as the contract is unperformed. *Id.*

STATUTE OF FRAUDS.

See TRUSTS AND TRUSTEES, 4, 7.

SURETYSHIP.

See GUARDIAN AND WARD, 1, 2, 10, 11.

TAXATION.

1. **TAX SALE OF LAND** of D. Troyer under execution in a tax suit against D. Tragar, in which notice was given the latter by publication, but no notice was given the former, is void as to him and his heirs, though it may appear from the recorded deed of the same land so sold that D. Tragar was the grantee therein. *Troyer v. Wood*, 367.
2. **SITUS OF PERSONAL PROPERTY.** — Visible, tangible personal property, permanently located in another state, is taxable, it seems, within such jurisdiction, irrespective of the residence or domicile of the owner; but intangible property, such as bonds, mortgages, and other evidences of debt, is taxable at the domicile of the owner. *Commonwealth v. American Dredging Co.*, 116.
3. **SITUS OF UNREGISTERED VESSELS.** — Unregistered vessels, not permanently located anywhere, have their *situs* for taxation at the domicile of their owner, although, if registered, they are taxable at their home port of registry; and therefore unregistered vessels belonging to a Pennsylvania corporation, and not permanently located, but carried from state to state, are taxable in Pennsylvania, although they were built out of the state, and some of them were never within it. *Id.*

TELEPHONES.

See MUNICIPAL CORPORATIONS, 2-5.

TOWNSHIPS.

See INTEREST, 1; MUNICIPAL CORPORATIONS, 6; NEGOTIABLE INSTRUMENTS, 12.

TRADE-MARKS.

1. **MAY CONSIST** OF a name or devise, or a peculiar arrangement of words, lines, or figures, or any peculiar mark or symbol, not theretofore in use, adopted and used by a manufacturer or a merchant for whom goods may be manufactured, or to designate them as those which he manufactures or sells. It may be put either upon the article itself, or its case, covering, or wrapper, and is assignable with the business. The term cannot be properly applied to a label; it may, however, contain one. Mere words may not be used as a trade-mark, except they indicate origin, ownership, or the maker. *Metcalf v. Brand*, 282.
2. **IF A GEOGRAPHICAL NAME BE USED AS SUCH, IT CANNOT BE PROTECTED AS A TRADE-MARK**, but as to a manufactured article, although the name of the place where it is made serves in no possible way to indicate its quality or composition, yet where the manufacturer has given it a geographical name, which he was the first to use in connection with the article, it may, from long use in such connection, acquire a secondary meaning, and instead of designating the place where the article is made, indicate its origin, or that it is the product of a particular manufacturer, or made according to his method. When this is the case, it becomes a

valid trade-mark. A distinction should be made between the use of a geographical name indicating a particular manufacture of a certain person, and its use in describing a natural product of a particular locality. *Id.*

3. **INJUNCTION.** — A PERSON IS ENTITLED TO BE PROTECTED IN THE USE OF A PARTICULAR LABEL OR WRAPPER as much as in the use of a trade-mark. One may not use the label of another or a colorable imitation. The simulation need not be exact; the copy may be made with slight changes even. If it be substantially imitated, and so essentially alike that persons of ordinary observation and the unsuspecting public are likely to be deceived, it is sufficient to authorize equitable intervention by injunction. *Id.*
4. **THE INTRODUCTION OF THE WORD "IMPROVED"** into the name of an article manufactured by the defendant will not justify its use, if, in other respects, the plaintiff has just grounds to object to it. *Russia Cement Co. v. Le Page*, 685.
5. **ONE MAY PART WITH THE RIGHT TO USE HIS OWN NAME AS A DESIGNATION** or description of a manufactured article, and confer that right exclusively upon another. In that event he will be enjoined from using his own name as a description of an article of his own manufacture, and from selling the article under that particular name. *Id.*
6. **ONE PARTS WITH THE RIGHT TO USE HIS OWN NAME AS A TRADE-MARK OR NAME**, when, having permitted it to be used as part of a trade name or mark of a partnership of which he was a member, the partnership sell their business and "the right to use the trade-marks belonging to or in use by said copartnership." *Id.*

TRESPASS.

DAMAGES MAY BE SEVERED AGAINST JOINT TRESPASSERS, with the right on the part of the jury to punish the wrong-doer to the extent of his participation in the wrongful act, and if one is more guilty than the other, to punish him more severely: Kentucky Statutes, Act 1839; and if this statute were not in force, a reversal on account of the damages being severed would only result in directing a joint judgment against the defendants for the real amount of damages assessed. *Central Passenger Ry Co. v. Kuhn*, 309.

See LANDLORD AND TENANT.

TRIAL.

1. **AGREED STATEMENT OF FACTS.** — Determination of a case upon an agreed statement of facts is, in effect, a special verdict, and the court pronounces judgment upon such facts precisely as if the jury had found a verdict in that form. Hence, if there is any ambiguity, any omission of facts necessary to a recovery, any lack of clearness and certainty on material points, the judgment will not be allowed to stand. *Carr v. Lewis Coal Co.*, 328.
2. **NONSUIT — WHEN EVIDENCE IS TO BE SUBMITTED TO JURY.** — There is in every case triable by jury a preliminary question of law for the court, whether or not there is any evidence from which the fact sought to be proved may be fairly inferred; if there is, that is sufficient to send the case to the jury, no matter how strong may be the proofs to the contrary. *Sidney School Fur. Co. v. Warsaw School Dist.*, 124.

- trial, or by an instruction at the close of the evidence; and when this is done, the fact that the jury heard the evidence will not warrant a reversal of the judgment. *Stephens v. Hannibal and St. Joe R. R. Co.*, 338.
4. WHILE MUCH LATITUDE IS ALWAYS ALLOWED COUNSEL IN STATEMENT OR ARGUMENT of a case, there are bounds which ought not to be transgressed. As a general rule, a full statement of the facts expected to be proved on the trial, with a statement of the law relied upon, is sufficient. *McDonald v. People*, 547.
5. ATTORNEY FOR PEOPLE SHOULD NOT BE ALLOWED TO BRING BEFORE JURY, in his opening statement, matters with which they have nothing to do, such as the force, effect, or office of exceptions that may be taken by defendant's counsel during the trial, the fact that the defendant has applied for a change of venue, or the fact that the law has been so changed that a defendant may testify in his own behalf; nor should he be permitted to state to the jury that, in case the defendant is found guilty, he has a right to an appeal to the supreme court, whose judges will consider whether or not they will grant him a new trial; or to ridicule to the jury the laws of the state under which criminals are tried. And when objection is made, he should be compelled to confine his argument to a consideration of such matters as properly pertain to the case under the evidence. *Id.*
6. COURT MAY CONFINE COUNSEL WITHIN REASONABLE LIMITS IN CROSS-EXAMINATION of witnesses, and the exercise of its discretion in doing so, if not abused, cannot be assigned for error. *Birmingham Fire Ins. Co. v. Pitzer*, 598.
7. REMARKS OF COURT IN RULING UPON ADMISSIBILITY OF EVIDENCE, consisting of statements that the evidence upon certain points was thus and so will not be ground for reversal, where the jury were told that they were the judges of the weight of the evidence and of the credibility of the witnesses, and were given the usual instructions as to the preponderance of the evidence, and made to thoroughly understand that it was their province to determine what were the facts established by the evidence. *Id.*
8. COURT SHOULD DIRECT JURY TO FIND FOR DEFENDANT, where, if the case were submitted to them and a verdict for the plaintiff returned, it would have been the duty of the trial court to set the verdict aside. *Blanchard v. Lake Shore and Michigan Southern R'y Co.*, 630.

See APPEAL, 14.

TRUSTS AND TRUSTEES.

1. ACTIVE TRUST—FEE REMAINING IN TRUSTEES.—Fee ordinarily vests at once in the association, when a deed is made to trustees for a church or other charity; but this is not so where the trust is active and continuing, as where it is created for the support of a special use. *Appeal of Lathaw*, 76.
2. EXPRESS TRUST CAN BE CREATED ONLY BY A WRITING, subscribed by the party creating it, under the Civil Code of California. *Barr v. O'Donnell*, 112.
3. EXPRESS TRUST IN FAVOR OF GRANTEE CANNOT BE ESTABLISHED BY PAROL EVIDENCE that the grantee agreed to hold the property in trust or to convey it. *Id.*

4. **DEFENSE OF THE STATUTE OF FRAUDS MAY BE TAKEN ADVANTAGE OF BY DEMURRER**, if the complaint states that the alleged express trust upon which plaintiff relies rests in a parol agreement to reconvey. *Id.*
5. **AN INVOLUNTARY TRUST IS DEFINED** by the Civil Code as "one which is created by operation of law"; and by the same code, "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." A complaint alleging that the plaintiff and defendant, being tenants in common of a parcel of land, each conveyed to the other a described portion thereof, at the time mutually agreeing by parol that the partition was unequal, and that the defendant should thereafter, on request, reconvey to plaintiff such part as would make the parts owned in severalty by each of equal value, and that defendant, though requested, refuses to so convey, does not disclose facts sufficient to convert the defendant into an involuntary trustee; and a demurrer thereto should be sustained. *Id.*
6. **RESULTING TRUST, WHEN ARISES.** — Where a person enters public lands with land warrants owned by himself and another, and takes the legal title in his own name, a resulting trust is thereby created in the lands in favor of such other, in proportion to his interest in the warrants, without regard to any express contract between them. But if there is a contract between them, it may be looked to as affording evidence of the relation between them and the character of the transaction. *Reynolds v. Sumner*, 523.
7. **STATUTE OF FRAUDS DOES NOT APPLY TO RESULTING TRUST.** The transaction and acts of the parties from which such trust results may be shown by parol as well as by written evidence. *Id.*
8. **RESULTING TRUSTS ARE DISTINGUISHED FROM EXPRESS TRUSTS** in the manner of their creation. *Id.*
9. **LACHES OR STATUTE OF LIMITATIONS MAY CONSTITUTE BAR TO SUIT TO ENFORCE RESULTING TRUST.** But while the defense of laches may be available in cases of resulting and implied trusts, yet within what time the bar will be held complete must depend upon the circumstances of the particular case. Lapse of time is only one of many circumstances from which the conclusion of laches must be drawn. *Id.*
10. **CREATOR OF TRUST TO SECURE PAYMENT OF MONEY MAY GIVE IT ANY SHAPE** he chooses; he can appoint not only a trustee, but also a successor in the trust, and he may prescribe the conditions upon which such successor may take the place of the original trustee and execute the trust. *Irish v. Antioch College*, 638.
11. **REFUSAL OF TRUSTEE IN TRUST DEED TO ACT, EFFECT OF.** — Where a trust deed provides that upon the refusal of the trustee named therein to act, the title thereby conveyed and the power therein conferred should become vested in another person named as successor in the trust, upon such trustee's refusal to act, the legal title to the land conveyed by the deed and the power of sale created by it pass, by operation of the power of appointment already exercised by the creator of the trust, to and become vested in the successor in the trust. *Id.*
12. **TRUSTEE'S SALE IS NOT INVALIDATED BY MISRECITAL IN NOTICE OF SALE** and in the deed of the circumstances which devolved the execution of the trust upon him, where the deed of trust contains no provision requiring a recital of such circumstances. *Id.*

- IRREGULARITY.** — In a suit to set aside a trustee's sale, made under a power in a deed of trust, for a mere irregularity which does not render the sale absolutely void, if the complainant, with full knowledge of the alleged irregularity in the sale, lies by for more than ten years, during which time the property in question becomes largely enhanced in value, large sums are spent upon it by way of repairs and improvements, and the rights of purchasers and mortgagees intervene, his delay will constitute a bar to the relief sought by him. *Id.*
14. **OWNER OF EQUITY OF REDEMPTION MUST AVAIL HIMSELF IN APT TIME OF IRREGULARITIES** in a sale under a power in a mortgage or trust deed, and his failure to do so will constitute laches. He cannot be permitted to lie by and await events, and have the power, at any time in the future, to let the sale stand or to avoid it, according as it may be found then for his interest to do. He must act promptly within a reasonable time. *Id.*
15. **TRUST WILL NOT BE PERMITTED TO FAIL THROUGH FAILURE OR DERELICTION OF TRUSTEE** to execute the trust, but will be supported upon the intention of the testator that the trust is attached to and fastened to the land, and that the land remains chargeable with it in the hands of the heirs or devisees. *Seda v. Huble*, 495.
16. **TRUSTEES' POSSESSION TAKEN UNDER TRUST DOES NOT BECOME ADVERSE** until the trust is openly disavowed or denied, and knowledge of this fact is brought home to the *cestui que trust*. *Reynolds v. Sumner*, 523.
17. **LACHES CANNOT BE IMPUTED TO CESTUI QUE TRUST** so long as his rights are acknowledged by his trustee. Until the trust is repudiated, he has a right to rely upon the integrity and faithfulness of his trustee, without forfeiting his rights. *Id.*
18. **CHARITABLE TRUST.** — GIFT TO ONE OF MONIES OR PROPERTY "TO BE DISPOSED OF BY HIM FOR SUCH CHARITABLE PURPOSES as he shall think proper" is a good charitable trust. *Misot v. Baker*, 713.
19. **CHARITABLE TRUST.** — COURT OF EQUITY WILL FRAME A SCHEME TO CARRY OUT A CHARITABLE TRUST OR BEQUEST upon the death of one to whom property had been devised or bequeathed "to be disposed of by him for such charitable purposes as he shall think proper." *Id.*
20. **ADDITIONS OF INTEREST TO THE CAPITAL OF A FUND MUST BE ASSUMED TO HAVE BEEN MADE WITH THE ASSENT OF THE BENEFICIARY** for all purposes, when she has received interest on the new capital for a long period of time, never objecting to the additions nor demanding the interest which had been capitalized. *Id.*
21. **WILL, CONSTRUCTION OF.** — WHERE A TESTATOR MADE DEPOSITS IN A LIFE INSURANCE COMPANY, and caused policies to be issued promising to pay M. G. interest, and after her death to pay the amount of the principal sum to the testator, his successors or administrators, and the testator in making his will stated that he had made provision for M. G., and that "it is not my wish that any investment which I have made or may hereafter make for her should be disturbed or changed by this will, but I direct that the same shall remain and be disposed of according to the conditions thereof in the same way as though this will had not been made," and then made a general devise of his property to a charitable trust, it was held that the will nevertheless operated upon these policies, and that the amount due thereon (M. G. having in the mean time died) vested in the trustee of the charitable trust, and not in the heirs of the testator. *Id.*

INDEX.

VENDOR AND VENDEE.

1. **GENERAL RULE IS, THAT PURCHASER OF REAL ESTATE IS CHARGED WITH NOTICE** of the equities of one in possession. But it is in Iowa, that possession by a grantor, after full conveyance, is constructive notice to subsequent purchasers of any right reserved in by the grantor. *May v. Sturdivant*, 463.
2. **CONSTRUCTIVE NOTICE FROM CONTINUED POSSESSION BY CO-TENANT.** Where a tenant in common of land, who is in possession, purchases interest of his co-tenant, who is not in possession, and fails to record deed recorded, and there is no visible change in the possession of land, though some improvements are made thereon, and subsequently interest of the co-tenant who had conveyed is sold on execution, purchaser of such interest, who had no actual knowledge of the previous conveyance, and did not know that the improvements were made exclusively by the purchasing co-tenant, is not chargeable with notice of tenant's rights under his deed. *Id.*

See CONTRACTS, 2.

VERDICT.

1. **SPECIAL VERDICT — INCONSISTENT FINDINGS — DIRECTING JURY TO RETURN VERDICT — POLLING JURY.** — Court may decline to receive special verdict the findings of which are inconsistent, and manifestly under a misapprehension of the instructions, and after explaining instructions previously given, direct the jury to retire for further deliberation; and a request to poll the jury before they so retire is proper and may be denied. *Wightman v. Chicago and Northwestern Railway Company*, 778.
2. **SPECIAL VERDICT.** — If the jury in a special verdict fail to find a certain fact, the court may assume them as not proved. But if such finding be contrary to the evidence, it may be sufficient reason for a new trial but not grounds for a *venire de novo*. *Louisville, New Albany, and Cincinnati Railway Company v. Buck*, 883.
3. **SPECIAL VERDICT — INSTRUCTIONS.** — Where the jury has been directed to return a special verdict, general instructions as to the law of the case are not proper. *Id.*

See APPEAL, 15; DAMAGES, 3; JURY AND JURORS, 2, 3.

VESSELS.

See TAXATION, 3.

WATERCOURSES.

1. **CONSTITUTIONAL LAW — RIGHT OF FISHERY.** — State has the right to regulate the exercise of the common right of fishery in its navigable waters and to impose such limitations and restrictions on the exercise of such right as it may deem wise and just, including the right to authorize removal of obstructions or nuisances caused by fishermen in such navigable streams. *Rea v. Hampton and Nichols*, 21.
2. **CONSTITUTIONAL LAW — RIGHT OF FISHERY.** — Chapter 115 of North Carolina acts of 1875 (Code, sec. 3383), making it unlawful for any person to set or fish a "Dutch" or "Pod" net in certain waters of the state, and authorizing an officer to remove such net when set or fished, is constitutional. *Id.*

3. **NAVIGABILITY, TEST OF.**—Navigability in fact, and not the ebb and flow of the tide, is made the test, in Pennsylvania, by which the character of a stream, as public or private, is determined; and the great but tideless rivers of the state are therefore navigable rivers, belonging to the state, and held for the use of all her citizens. *Palmer v. Williams*, 88.
4. **GRANT OF LAND BOUNDED UPON STREAM, EXTENT OF.**—Grant of land bounded upon a non-navigable stream extends *usque ad flum medium aquæ*; but a grant of land bounded upon a navigable river extends to ordinary low-water mark. *Id.*
5. **GRANT OF LAND BOUNDED UPON NAVIGABLE STREAM—SERVITUDE OF PUBLIC.**—Grantee of land bounded upon navigable stream takes, between high and low water mark, subject to the rights of the public; and as between him and the public, may use his land below the line of high water for such purposes only as do not interfere with the free flow and navigation of the water. *Id.*
6. **RIPARIAN RIGHTS IN NAVIGABLE STREAM.**—Neighboring riparian owners upon navigable stream are bound to observe the obligations that grow out of their ownership of the soil above low-water mark and their proximity to one another; and one has no more right to injure another with the waters thereof than with the waters of a non-navigable stream. *Id.*
7. **OWNERSHIP IN WATER.**—Riparian owner upon navigable stream has no ownership in the water, either above or below low-water mark, and has therefore, as between himself and the commonwealth, no greater right in it than any other citizen. *Id.*
8. **ERECTION OF DAM—RIGHT TO WATER-POWER.**—Riparian owner upon navigable stream has no right to erect a dam to turn the water to his mill without a grant from the commonwealth; and if he does so, he is a trespasser, and acquires no title to the water-power resulting therefrom. *Id.*
9. **DIVERSION OF WATER—ACTION FOR DAMAGES.**—One riparian owner upon navigable stream cannot maintain an action for loss of water-power caused by the diversion of the stream by another owner, he having no title to the water, and no legal right to the power; but he may recover if, in consequence of such diversion, he has been deprived of convenient access to and use of the stream for those purposes to which he is entitled as a riparian owner. *Id.*
10. **ALTHOUGH RIPARIAN OWNER MAY WITHDRAW WATER FROM A STREAM BY ORDINARY MEANS,** or by artificial channels, for the purpose of supplying the wants of men and animals, even to the extent of producing a material diminution in the force and volume of the current, yet it cannot be withdrawn for the purpose of irrigation or for any other secondary and artificial purpose, except in such a reasonable and legitimate way as not to interfere unjustifiably with its general use, and this principle applies to a railroad corporation which constructs a dam to supply locomotives and for the use of the railroad. *Anderson v. Cincinnati Southern Railway*, 263.
11. **IN ACTION FOR UNLAWFUL OBSTRUCTION AND DIVERSION OF WATER BROUGHT AGAINST RAILROAD CORPORATION,** IT IS NO DEFENSE that defendant had leased its road, and that it was not in possession or control of the dam which was alleged to be the means by which the water was obstructed and diverted. *Id.*
12. **UNDER THE KENTUCKY STATUTE,** ONE WHO ERECTS A MILL OR MANUFACTORY ON A WATERCOURSE ACQUIRES a vested right which cannot

be lawfully infringed by any other person or corporation, or taken or applied to public use, without just compensation being previously made. *Id.*

12. **RIPARIAN RIGHTS.** — UNDER THE KENTUCKY STATUTE, ONE CONSTRUCTING A DAM MAY BE FULLY PROTECTED AGAINST CLAIM FOR DAMAGES, by application to the county court to construct said dam, and the payment to riparian proprietors, above and below, of the damages sustained by them on account of building said dam; but a dam may be constructed without making such application, though if in doing this one obstructs the natural flow of water so as to lessen the supply of his neighbor below or to overflow his land above, he must answer in damages. *Id.*

WILLS.

1. **CONSTRUCTION.** — Where a testator employs words and phrases to express his intention in the disposition of his property by will, that have a well-known, legal, or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall in some appropriate way, to some extent, to be seen in the will, have qualified or used them in a different sense. And so also, if the use of such words brings his intention so expressed within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intent of the testator. *Leathers v. Gray*, 30.
2. **CONSTRUCTION.** — Testator cannot ignore, displace, and set at naught a rule of law applicable to and affecting the disposition of his property by his will, in whole or in part, and he must express his intention in words appropriate and sufficient to express his real meaning, and if he employs technical legal words, the technical meaning must prevail, unless the same shall be qualified or modified by superadded words in the will. *Id.*
3. **RULE IN SHELLEY'S CASE.** — Devise to a devisee "during her natural life, and after her death to the begotten heirs or heiresses of her body forever," vests in the devisee an absolute estate in fee-simple, according to the rule in Shelley's case. *Id.*
4. **CONSTRUCTION OF CLAUSE AGAINST ALIENATION.** — Where a testator devises land in trust "for the use and benefit of my three sons, in equal shares, so long as they all may live, with power to use and enjoy equally the rents, issues, and profits thereof during their natural lives. . . . My object in making the foregoing disposition of my property, and in attaching the limitations aforesaid, is to secure to my children a certain annual income beyond the accident of fortune and bad management on their part; and with this end in view, to take away from them the power of disposing of the same, or of creating any lien thereon, or of making the same liable in any way for their debts," — such limitation on the disposition of the income is valid, and not void as being in restraint of alienation. *Lampert v. Haydel*, 358.
5. **A DEVISE OR BEQUEST OF A BENEFICIAL LIFE ESTATE, SO AS TO SECURE ITS ENJOYMENT TO THE BENEFICIARY, WITHOUT MAKING IT ALIENABLE BY HIM, OR SUBJECT TO THE CLAIMS OF HIS CREDITORS,** will be respected by the courts of this state, and may be accomplished by a devise to F. of designated realty in trust to collect the rents and profits, and to pay the same to R., "into his own hands, and not into another, whether claiming by his authority or otherwise," and upon the death of R., to such of his children as may then be living. *Smith v. Towers*, 398.

6. **WILLITNESS OF IMPERIAL IN TESTOR FOR CHARITABLE PURPOSES SOCIETY.** — A bequest of a certain sum of money to persons named, "in trust for the benefit of the Catholic Church on my farm in T. County," and directing "that they or their successors shall invest said money safely for the benefit of said church, and that service be held in said church for my soul yearly," is for a charitable use, clearly defined, and is not invalid on the ground that if the trustees misused the fund, no one could call them to account, nor because the testator conditioned it upon services being held yearly for his soul. *Seda v. Heble*, 495.
7. **ATTESTATION CLAUSE — PRESUMPTION.** — Attestation clause, reciting that the witnesses signed in the presence of the testator, raises a strong presumption of that fact, which can be overcome only by clear and satisfactory proof to the contrary. *Will of O'Hagan*, 763.
8. **UNDUE INFLUENCE.** — Undue influence exists wherever, through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment. To affect a will, it must, in a measure at least, destroy free agency, and operate on the mind of the testator at the time of making of the will. *Herster v. Herster*, 95.
9. **UNDUE INFLUENCE.** — Testator's strength and condition of mind may become a proper, indeed an essential, subject of inquiry, in passing upon a question of undue influence, since a person of feeble intellect is much more easily influenced by undue means than one of vigorous mind. *Id.*
10. **TESTATOR'S DECLARATIONS.** — Declarations of the testator are admissible to establish the state and condition of his mind, in an issue raised upon the exercise of fraud and undue influence in the procurement of the will, if reasonably connected in point of time with the testamentary act; although such declarations cannot have any force in establishing the substantive fact of undue influence; and in the absence of evidence of other facts and circumstances showing undue influence should be excluded or wholly disregarded on that question, unless, perhaps, they were made at the very time of the execution of the will, and form a part of the *res gesta*. *Id.*
11. **TESTATOR'S WEAKNESS OF MIND, AND CONSEQUENT SUSCEPTIBILITY** to influence, must be shown to exist at the very time of the testamentary act, in an issue upon the question of undue influence; but declarations made before and after the execution of the will have some significance in showing, inferentially, the mental condition at that time. *Id.*
12. **LIMITATIONS AS TO TIME WHICH GOVERN THE ADMISSION OF TESTATOR'S DECLARATIONS**, in an issue upon the question of undue influence, must depend largely on the character of the unsoundness attempted to be proved. *Id.*
13. **UNDUE INFLUENCE — UNEQUAL DISPOSITION OF PROPERTY.** — It is only when a will is grossly unreasonable in its provisions, and plainly inconsistent with the testator's duty to his family, that, in case of doubt, the inequality can have any effect on the question of undue influence. *Id.*
14. **UNDUE INFLUENCE — SUBMISSION OF EVIDENCE TO JURY.** — In an issue *deviseis vel non*, the question of mental unsoundness, or of undue influence, ought not to be submitted to the jury, where the evidence is of such unsatisfactory character that the court would not sustain a verdict upon it; and such submission is good ground for reversal. *Id.*

See CONTRACTS, 2; TRUSTS AND TRUSTEES, 31.

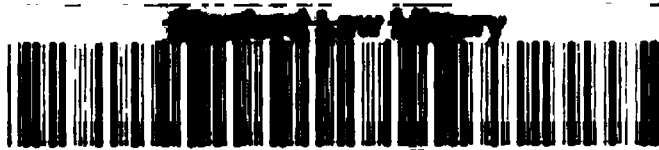
WITNESSES.

1. MAY BE SO INTERROGATED AS TO TEST THEIR TRUTHFULNESS; but this should be done in such manner that unseemly scenes between them and counsel may be avoided; and it is the duty of the court to exercise such restraining authority over counsel as will attain that end. *Baldwin v. St. Louis, Keokuk, and Northwestern R'y Co.*, 479.
2. COURSE OF EXAMINATION STOPPED BY COURT. — Where a witness was asked on cross-examination, in language hardly proper, whether his testimony was not false, which question he resented, and was then asked another question of like import, to which an objection was sustained, the court properly stopped the course of the examination. *Id.*

See LIBEL AND SLANDER.



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